No. 887 SUPREME COURT, U. S.

APR 2 1958

JOHN T. FEY, Clerk

IN THE

UNITED STATES COURT OF APPEALS

for the Fourth Circuit

No. 7543

COUNTY SCHOOL BOARD OF ARLINGTON COUNTY, VIRGINIA, AND T. EDWARD RUTTER, DIVISION SUPERINTENDENT OF SCHOOLS OF THE COUNTY OF ARLINGTON, VIRGINIA,

Appellants,

v.

CLARISSA S. THOMPSON, ET AL.,

Appellees.

Appeal From The United States District Court For The Eastern District of Virginia, Alexandria Division.

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Alexandria, Virginia.

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SUBJECT INDEX

	Page
Brief On Behalf Of The Appellees	1
Statement Of The Case	1
Questions Involved	3
Statement Of The Facts	4
Argument	4
I. The Pupil Placement Act Did Not Justify Appellants In Refusing To Admit The Minor Appellees To The Schools To Which They Applied	4
II. The Pleadings And Proof Were Sufficient To Justify The District Court In Granting The Appellees The Relief Sought	9
III. The District Court Properly Exercised Its Discretion In Fixing September 23 As The Effective Date Of Its Injunction	16
IV. The Proceedings In The District Court Were Consistent With The Federal Rules Of Civil Procedure And The Rules Of The District Court	19
Conclusion	25

TABLE OF CITATIONS

Cases

Allen v. County School Board of Prince Edward County, F. 2d (C. A. 4th, No. 7463, November 11, 1957) 18, 22, 23

American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., 3 F. R. D. 162 (S. D. N. Y. 1943) 23

Anderson v. Brady, 5 F. R. D. 85 (E. D. Ky. 1945) 20

Brown v. Board of Education, 347 U. S. 483 (1954) ... 17
Brown v. Board of Education, 349 U. S. 294 (1955) ... 24
Carson v. Warlick, 1956, 4 Cir., 238 F.2d 724 ... 18
County School Board of Arlington County v. Thompson, 240 F.2d 59 (C. A. 4th 1956), cert. denied 353 U. S. 910 (1957) ... 2, 7, 16, 18
County School Board of Chesterfield County v. Freeman, 171 F.2d 702 (C. A. 4th 1948) ... 17
DeFelice v. County School Board of Fairfax County, [Va. , December 2, 1957] ... 7
Lane v. Wilson, 306 U. S. 268 (1939) ... 17
Orleans Parish School Board v. Bush, 5 Cir., 242 F.2d 156, cert. denied U. S. , 25 L. W. 3374 ... 5
Quong Wing v. Kirkendall, 223 U. S. 59 (1912) ... 17
Richmond v. Deans, 37 F.2d 712 (C. A. 4th 1930), aff'd. 281 U. S. 704 (1930) ... 17
School Board of Newport News v. Atkins, 246 F.2d 325 (C. A. 4th 1957), cert. denied U. S. , 78 S. Ct. (Adv.) 83 (1957) ... 4, 5
Tate v. Department of Conservation & Development, 231 F.2d 615 (C. A. 4th 1956), cert. denied 352 U. S. 838 (1956) ... 9
Wilson v. City of Paducah, 100 F. Supp. 116 (W. D. Ky. 1951) ... 23
Wolpe v. Poresky, 79 App. D. C. 141, 144 F.2d 505 (1944), cert. denied 323 U. S. 777 (1944) ... 23

Statutes

Va. Code (1950), §§ 22-232.1 to 22-232.16 ... 2, 4
Chapter 68, Acts of Assembly of Virginia, Extra Session 1956 ... 8

Page

Federal Rules of Civil Procedure, Rule 6(d) 20

Federal Rules of Civil Procedure, Rule 83 21

Rules of the United States District Court for the Eastern District of Virginia, Rule 13 21

INDEX TO APPENDIX

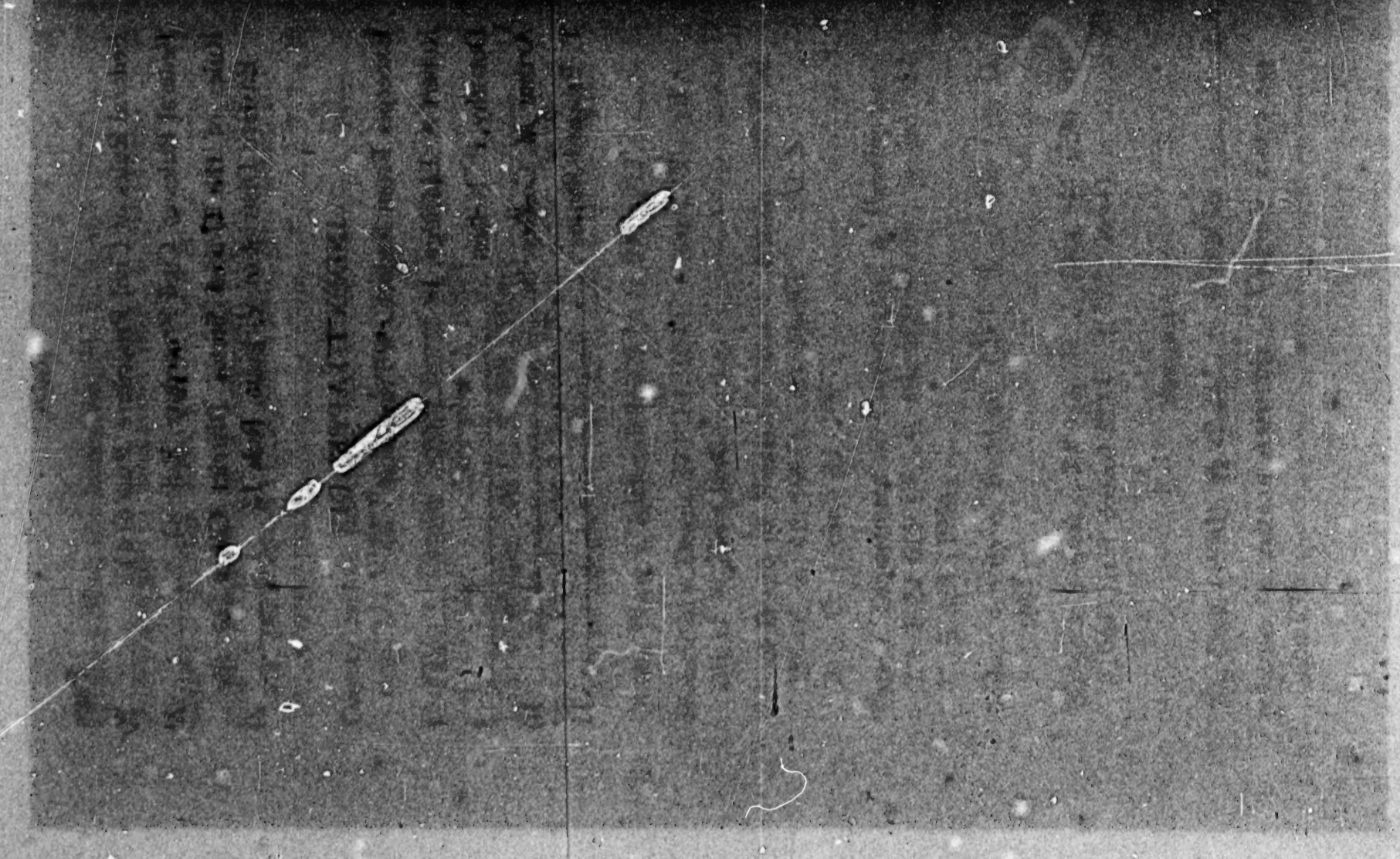
Excerpts From Reporter's Transcript

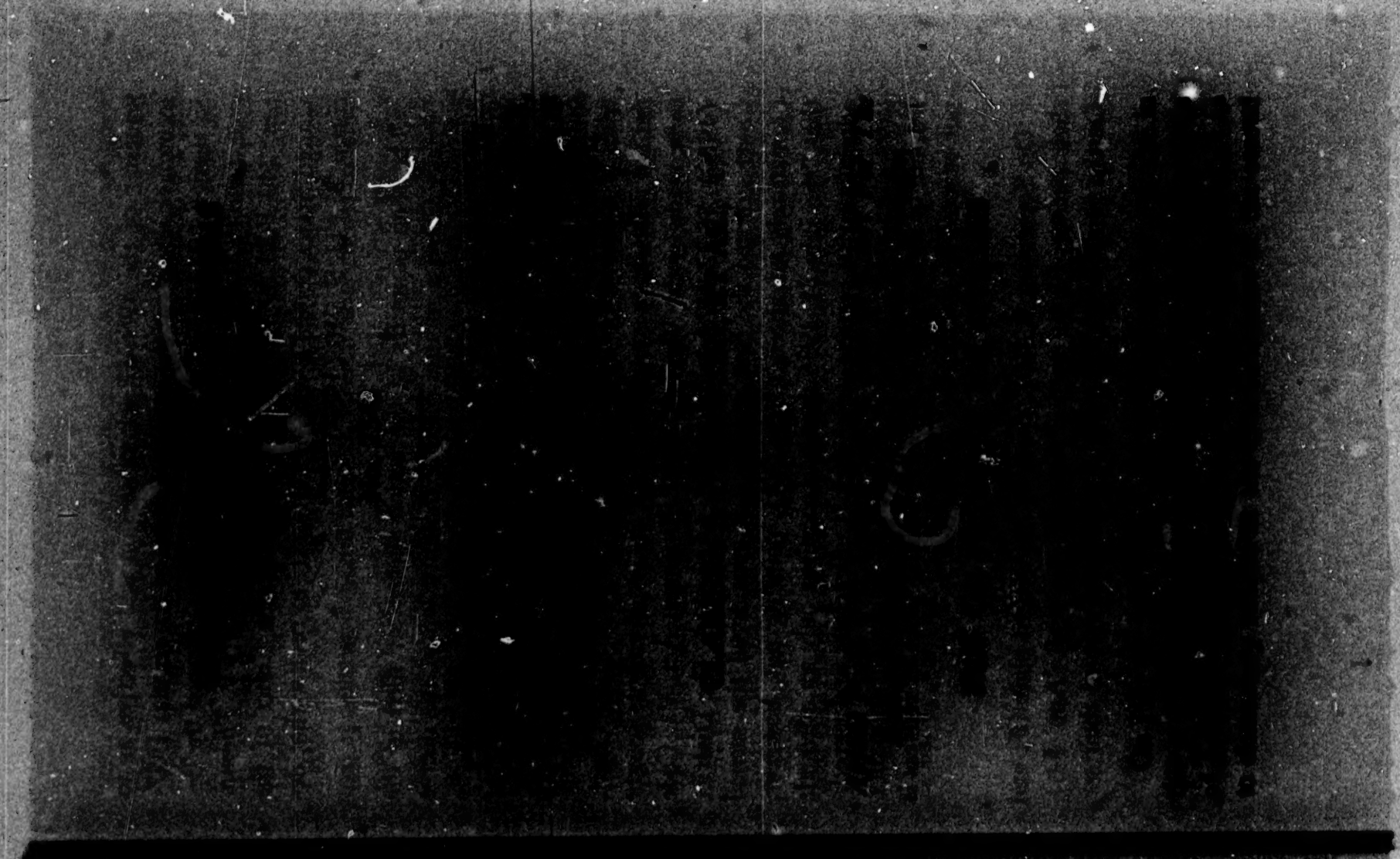
Robert A. Eldridge, Jr. 1

Dorothy P. Nelson 5

Arthur M. Cooley, Sr. 10

T. Edward Rutter 11





[redacted] administrative proceeding is prescribed

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> [Pupil Placement] Board for school-assignment. The reason is that the form prescribed therefor commits the applicant to accept a school 'which the Board deems most appropriate in accordance with the provisions' of the Pupil Placement Act. Submission to that Act amounts almost to assent to a racially segregated school. But even if the form be signed 'under protest,' the petitioner would not have an unfettered and free tribunal to act on his request. The Board still deliberates, on a racial question, under threat of loss of State money to the applicant's school if children of different races are taught there." (App. 19-20).

We believe that the precedents established by this Court are dispositive of the issue raised by appellants, and that the District Court was clearly correct in its conclusion. While *Athins* involved the contention that the Act's administrative remedies must be pursued, we think that it was implicit in that decision that the attempted transfer of school assignment powers would not benefit the local school authorities. The provision of the Act undertaking to remove those powers from local school boards and to place them in the Placement Board was, of course, enacted legislation at the time of the District Court decrees in those cases and at the time of the hearing and disposition of the appeals here. There appears to be no suggestion, either in the briefs or the opinions, that this displacement could be successful unless the remedies themselves were adequate. It seems quite anomalous that appellees could be deprived of their constitutional rights on the ground that the only agency empowered to grant them is an agency their remedies before which are inadequate to afford those rights.

We cannot agree with appellants in their contention that the issue is non-Federal in character and should await a definitive decision of the Supreme Court of Appeals of Virginia. It would perhaps suffice to point out that on December 2, 1957, that Court decided *DeFebio v. County School Board of Fairfax County* without ruling on the point raised by the appellants here. But we consider that the answer is even more fundamental. The provision seeking transfer of the enrollment authority is not only a part of a statute containing no severability clause, but is also inextricably bound to the remedies themselves. Indeed, the point seems but the resurrection in slightly new form of the same argument that was unavailing in the *Aaron* and case. We do not have the simple question whether the state has power to transfer the admission power from schools boards to a central agency, but are again faced with the old question whether these applicants are to be remitted to a procedure before an agency that could not afford the relief to which they are legally entitled. As we understand, this insistance upon a state statutory bar to the exercise of a Federal right necessarily presents a Federal question.

B

The rights of Arlington children to nonsegregated schooling were judicially established prior to the enactment of the Pupil Placement Act. Upon the first appeal in this action, *County School Board of Arlington County v. Thompson*, 240 F. 2d 59 (1956), this Court had under review the decree whereby this was accomplished. The District Court then provided:

"... it is further *Adjudged, Ordered* and *Decreed* that effective at the times and subject to the conditions

hereinafter stated, the defendants, their successors in office, agents, representatives, servants and employees be, and each of them is hereby, restrained and enjoined from refusing on account of race or color to admit to, or enroll or educate in, any school under their operation, control, direction, or supervision any child otherwise qualified for admission to, and enrollment and education in, such school." (R. 181).

As the Court knows, it was at the 1956 extra session of the General Assembly that the Pupil Placement Act was passed. It did not become law until the latter part of December, 1956. Thus, as the District Court stated:

> "It must be remembered that we are viewing the Act in a different frame from the setting in which it was tested by the Court of Appeals. The Act was then appraised as an administrative remedy which had to be observed before the persons aggrieved could seek a decree of judicial relief. Now the Act is measured against the enforcement of a decree already granted. It is, too, a decree which was passed before the adoption of the Placement Act and bears the approval of the final courts of appeal." (App. 19).

We submit that the prohibitions of the injunction could not be avoided by the simple expedient of an undertaking to transfer the assignment power from the school board to the Placement Board. We think that the District Court was eminently correct in its conclusion in this regard:

> "The court must overrule the claim of the County School Board and Superintendent that they should not be held to answer for the denial of admittance to the

plaintiffs. In this they urge that the Placement Board had sole control of admissions—that the School Board and Superintendent had been divested by the Act of every power in this respect. As just explained, the Placement Act and the assignment powers of the Placement Board are not acceptable as regulations or remedies suggesting direct obedience of the injunction. In law the defendants are charged with notice of these infractions in the Board's authority. Actually the plaintiffs were denied admission by the defendants' agents—the school principals—while the defendants had the custody and administration of the schools in question.

"Hence, the refusal by the defendants, immediately or through their agents, to admit the applicants cannot here be justified by reliance upon the Placement Board. The defendants were responsible, also, with knowledge that the injunction was binding on the Placement Board. The latter was the successor to a part of the School Board's prior duties; as a successor in office to the School Board, the Placement Board is one of those specifically restrained by the injunction." (App. 20).

See also *Tate* v. *Department of Conservation & Development*, 231 F.2d 615 (C. A. 4th 1956), *cert. denied* 352 U. S. 838 (1956).

II

The Pleadings And Proof Were Sufficient To Justify The District Court In Granting Appellees The Relief Sought.

The motion for further relief and the complaint in intervention each alleged that the children involved made timely

application to appellants for admission for the 1957-58 school session to a public school in the county theretofore maintained for and attended by white children only; that each such child was denied admission to such schools on the ground that the Placement Act deprived appellants of authority to admit such children to such schools; and that defendants denied each such child who had ever applied to the Placement Board for assignment admission to any public school in the county (App. 5, 9). Each further alleged that it would have been futile for any such child to apply to the Placement Board in an effort to obtain a racially non-segregated education (App. 5-6, 9-10). These allegations, hardly disputed by appellants, are fully sustained by the evidence, and both allegations and proof, viewed in the light of their factual antecedents, establish a deprivation of appellees' constitutional rights solely on the basis of their race.

A

Arlington County maintains 4 schools for Negroes (Tr. 111-112, 113, 114) and more than 45 for whites (Tr. 114-115). Prior to the current school session, the school authorities had formulated boundaries of five areas, denominated "districts," to be respectively served by the various schools, and admission to each school was restricted to pupils residing in the district served by that school and, of course, was further restricted by the practice of racial segregation.

There were 3 elementary and 1 secondary school districts for Negroes (Tr. 112-119, 123; Pl. Ex. 8, 9). The Negro secondary school district was unique in its division into two geographical parts, not contiguous, the centers of which were five or six miles apart, served by a combination junior-

senior high school, located in the southern portion of the two-part district, which was and is the sole secondary facility for Negroes in the county (Tr. 112-113, 117-119; Ex. 8).

The classification of school districts as white or Negro was purely a matter of race (Tr. 119, 123, 124), and was a long standing practice (Tr. 111, 131). The boundaries of white school districts were fixed in terms of the capacity of school buildings to house a given number of children (Tr. 119-120). To the extent to which a white school facility could accommodate the children in that area, the district boundaries were arranged so that the white child could go to the school nearest his residence.

Upon the opening of schools for the current session, the school authorities followed instructions issued by the Division Superintendent to principals of the various schools in attempted compliance with the requirements of the Placement Act, to decline admission of any child who had not applied to the Placement Board for assignment in any instance where the Placement Act required such application (Tr. 124-126). Principals were instructed not to assign new pupils, or those graduating or seeking transfer from one school to another; placement of all such children, if accomplished at all, must be done by the Placement Board (Tr. 125). All other children were necessarily frozen in the schools they previously attended (Tr. 133).

The county school authorities last formulated district boundaries for use during the 1956-57 school session, and presumably were adopted by the Placement Board in making the assignments it did for the current session (Tr. 132-133, 134). It assigned more than 2,000 Arlington children

(Tr. 128-129), and all schools remained segregated—actually attended by all-white or all-Negro student bodies (Tr. 129-130). There is no known instance of an assignment of any student of either race to a school attended by a student of the other race.

B

In August of 1957, four of the five adult appellees endeavored to arrange for the admission of their children to a public school within the established school districts in which they resided.

Appellee Robert A. Eldridge, Jr., after being advised by a school principal that he would have to make application to the Pupil Placement Board to secure the registration of his son in an Arlington County Public School, went to the office of the Arlington County School Board and endeavored to see the Division Superintendent of Schools. He did not see Dr. Johnson, the Superintendent, but explained his situation to [illegible] and stated that he would have to proceed through the Pupil Placement Board. Eldridge then obtained a letter to the Pupil Placement Board in which he identified his proposed school and asked to get his son registered in school. He also left a statement that he had not signed the pupil placement forms, and requested that, in view of the decision of this Court concerning applications to the Pupil Placement Board, the Superintendent register his son in the public school nearest his home or advise him where he could have him registered in such school. (Ex. 3.) On each occasion when he sought to register his son he had available the son's birth certificate and a copy of his previous scholastic record. Fillmore Elementary

School is one block and a half from the Eldridge home and the Hoffman-Boston School, a Negro facility, is four or five miles distant.

Early in August, Mrs. Phyllis S. Costley, the mother of Louis G. Turner and Melvin H. Turner, infant appellees, procured a map of the Arlington County School districts and, [illegible] that the Swanson Junior High School was the nearest junior high school to their residence, she then attempted to have the two enrolled in that school. The principal refused to enroll them. Mrs. Costley advised Mr. Rutter, the Superintendent, of these facts and requested him to have these children enrolled in Swanson Junior High School as the junior high school nearest their home. (Ex. 6.) Swanson Junior High School is not much more than three quarters of a mile from the Costley residence and Hoffman-Boston is about six or seven miles distant. On opening day of school the children were again refused admission to Swanson Junior High School, but subsequently on that same day they were admitted to Hoffman-Boston High School, without fee, or duty to [illegible] pupil placement application.

On August 28, 1957, Mrs. Dorothy Hansen sought to have her son, Leslie Hansen, Jr., enrolled in Stratford Junior High School and was advised that application would have to be made to the local Electoral Board. She and her husband then went to the Board's office. They were unable to see him personally, but were able to talk to him over the telephone. Mr. Rutter told them that the only means of registering the child was by signing the pupil placement form. Soon thereafter, Mrs. Hansen wrote Mr. Rutter a letter again requesting the enrollment of her son in Stratford Junior High School. On opening day of school, Leslie

Hamm, Jr. was again refused admission to Stratford Junior High School. Neither Mr. nor Mrs. Hamm signed the pupil placement form and at the time of the hearing Leslie was not enrolled in any school. Stratford is about a half mile from the Hamm residence and Hoffman-Boston is about six miles distant.

About August 19, 1957, Mrs. Dorothy P. Nelson and her son, George Tyrone Nelson, completed a pupil placement application form and submitted it to Mr. Richmond, the principal of Stratford Junior High School. They never received any reply to the application. On opening day, George Tyrone Nelson sought admission to Stratford Junior High School and was denied. Stratford is a half mile from the Nelson residence and Hoffman-Boston is six miles distant.

Dr. Harold M. Johnson was the only one of the adult appellees who did not make a good faith effort to enroll his children. He and his family had been away from the United States from July 27, 1957, until the day before Labor Day. He refused to sign a pupil placement form because he felt that it would prevent his children from attending the school nearest them and that even if he signed the forms his children would not be accepted. At the time he applied to Washington-Lee High School for the enrollment of his daughters he had their promotion slips and cumulative records available to hand over to the proper authorities.

C

In the foregoing circumstances, we submit that the District Court was absolutely correct in finding and concluding that

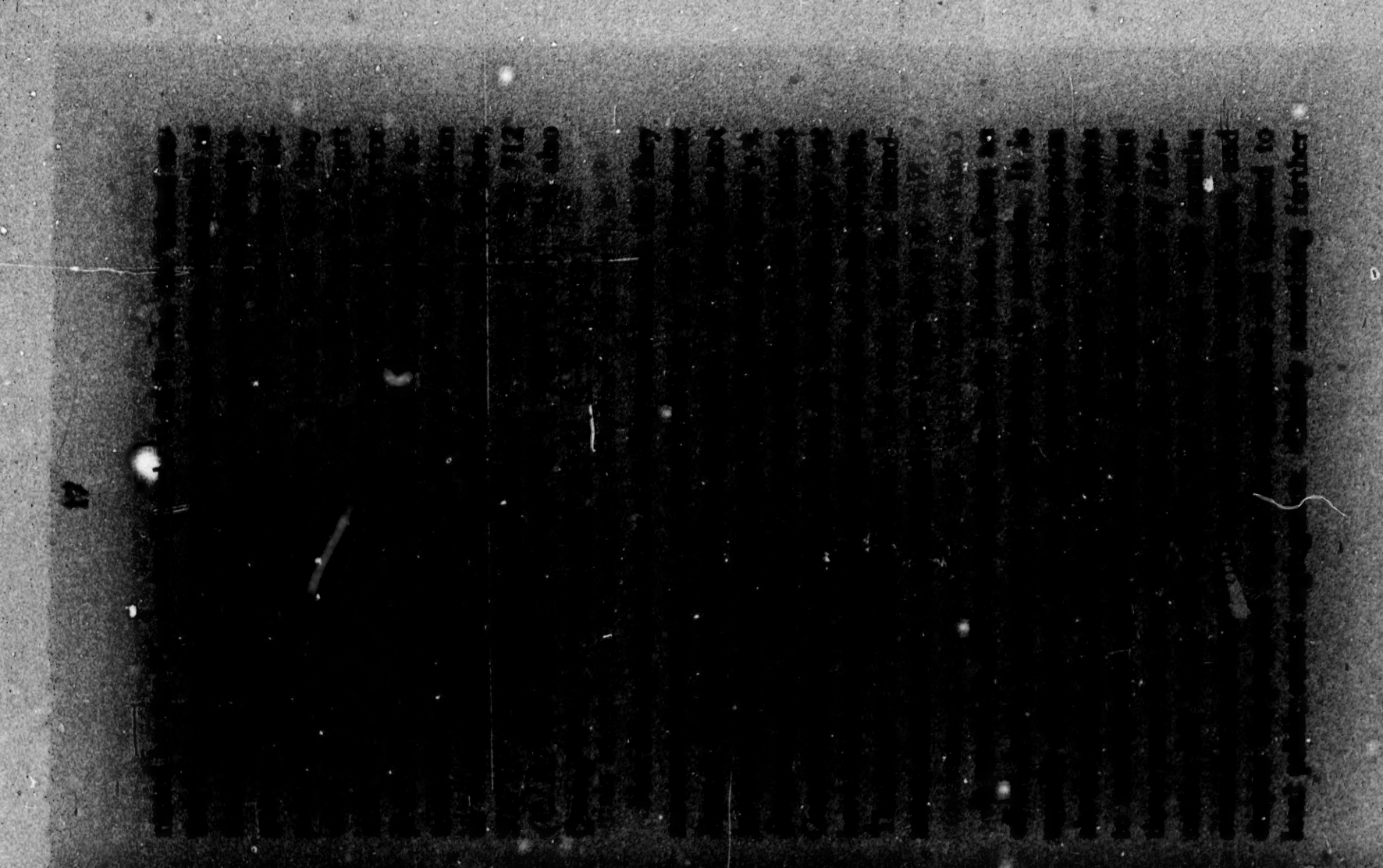
"Nothing in the evidence indicates that any of the plaintiffs is not qualified in his studies to enter the school which he sought to enter. Each applicant applied to a 'white' school but each lives in the district of that or of another nearby 'white' school. Nor did the evidence reveal a lack of room for him, or that the school did not afford the courses desired by the applicant. Counsel for the defendants explained that they did not address evidence as to the qualifications of the applicants for their respective schools because this was a matter within the province of the Placement Board. Anyway, no indication of disqualification appeared as to any applicant.

"A review of the evidence is convincing that the only ground upon which the provisions of the Plan were met by the objection of the plaintiffs was that they were of the Negro race. The objection was simply the application of the prior practice of segregation. No other ingredient can be considered in any of the seven instances." (App. 68).

Nor can the pre-assignment of the seven made by the Placement Board be justified as usual. George T. Nelson filed out a placement application and submitted it to the principal of Stratford Junior High School. The Placement Board assigned him to Stratford Junior High School. The Board assigned him to Stratford Junior High School. The applicants denied him admission to Stratford. The evidence is one-half mile from [illegible] Junior High School is about six miles away. As the District Court remarked:

"The basis for Mr. Nelson's placement is not given; no reason is evident for ignoring Stratford or Swan-

[redacted]



Z

Appellants' claim to prior notice of granting intervention, and to opportunity to answer the intervention complaint, could have substance only if in fact the intervention would be opposed, and the intervention complaint would be answered. In *Allen* v. *County School Board of Prince Edward County,* ..... F. 2d ..... (C. A. 4th, No. 7463, November 11, 1957), intervention was permitted, without objection, on the date of hearing without any claim for an opportunity to answer or any answer in fact (Appellants' Brief, p. 3.) One of the counsel representing appellants in this case represented one of the defendants there. And in the very case now before the Court, a previous intervention was permitted on the date of the hearing of July 31, 1956, without objection, and without any effort to seek or make an answer (Appellants' Appendix, No. 7310, p. 9). Indeed, the 1957 intervention complaint here presented no question that the original complaint and the motion for further relief had not already made an issue in the case.

Nor do we think that there was any impropriety in the manner in which the claims of the seven children were presented and heard. The original proceeding, which was reviewed here, was a class action (R. 3). The original injunction, entered July 31, 1956, restrained the school authorities from refusing, on racial grounds, the admission to any school of "any child otherwise qualified for admission to, and enrollment and education in, such school." (R. 181). The Court therein retained jurisdiction with power to enlarge or otherwise modify the injunctive provisions (R. 182). Three of the seven children now before the Court on this appeal were original plaintiffs, and the other four are members of the class on behalf of whom the action was initiated. Although the injunction imposed the requirement that adequate administrative remedies be exhausted before

litigation, it is clear that, within this limitaton, those originally parties plaintiff could appropriately seek further relief, and members of the class on whose behalf the action was brought should be permitted thereafter to intervene in order to participate in the benefits thereof. *Wolpe* v. *Poresky*, 79 App. D. C. 141, 144 F.2d 505 (1944), *cert. denied* 323 U. S. 777 (1944); *Wilson* v. *City of Paducah*, 100 F. Supp. 116 (W. D. Ky. 1951); *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 3 F. R. D. 162 (S. D. N. Y. 1943). See also *Allen* v. *County School Board of Prince Edward County*, ... F.2d ..... (C. A. 4th, No. 7463, November 11, 1957).

The claims of each of the seven children presented common questions of law and fact, and sought the same character of relief. The only defense offered was that the Pupil Placement Act had disabled the appellants from assigning them, and the questions whether this defense was valid, and whether the denials of admission were indeed a consequence of their race, were the legal issues in each instance. The only factual questions were whether the applicants were qualified to enter the schools to which they applied, and were denied admission thereto, and these were common to all cases, and hardly subject to dispute. And in each case there was sought a further decree specifically directing their admission to those schools. Although the seven children were presenting their individual grevances for determination, their respective claims, objectives and interests were common both to the main action and to each other. We submit that the District Court correctly permitted intervention and heard and determined these claims in the manner presented.

While appellants seem to now intimate (Brief, p. 11) that they were precluded by the procedure adopted below from

offering evidence, the point does not seem to be well taken. Efforts on behalf of five of the seven children were made substantially ahead of the opening of the current session to enroll them in particular schools, and there were both conferences and correspondence with the school authorities in this regard (Tr. 27, 28, 58, 60, 61, 96; Exs. 2-A, 3-A & F). Then, and at the opening of this session, these efforts were frustrated, not because of lack of qualifications or lack of space in the schools to accommodate them, but because of the administrative determination that assignments were the province of the Pupil Placement Board. There was ample opportunity for the authorities to investigate these claims, if investigation was indeed necessary, and to ascertain whether there were additional reasons why they should not be so admitted. More fundamentally, the appellants cannot now support a claim to additional time to investigate eventualities that under previous decrees they were already bound to anticipate and prepare for. For the District Court to have granted the request would have been to ignore "the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis," *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955), and "the known urgency of the situation." (App. 40). It would have been tantamount to deferring them to the next enrollment date.

It seems evident that appellants are presenting contentions as to developments that, in any event, produced no injury. The District Court expressed this opinion at the outset, but safeguarded their right to the protection of the Court should it develop that their rights became jeopardized. (App. 39-40). It appears that no injury resulted, and certainly no further request was made to the District Court for indulgence.

The proceedings under review were not a new case, presenting novel questions, but rather were merely the latest phase of litigation pending for more than a year and involving issues and contentions well known to all. Indeed, on July 27, just slightly more than a month before the September 11 hearing, counsel had extensively argued the principal question in the case—the effect of the Pupil Placement Act upon the Arlington situation. From the beginning appellants have been represented by able and experienced counsel well versed in the law and quite capable of adequately representing the interests of their clients. We think they did their job well, and now have no cause for complaint.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the judgments appealed from should be affirmed.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7543

COUNTY SCHOOL BOARD OF ARLINGTON COUNTY

Plaintiff

versus

THOMPSON, etc.

Appellees

Appeal From The United States District Court For The Eastern District of Virginia, Alexandria Division

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APPENDIX FOR THE APPELLEES

EXCERPTS FROM REPORTER'S TRANSCRIPT

Testimony of Robert A. Eldridge, Jr.

(tr 23) Q. Did you have any special reason for not signing the form?

A. I governed my action for two reasons. I had read in (tr 24) the papers where the form itself had been considered to be unconstitutional, and second, it appeared to me that it wouldn't be any use to fill out the form anyway because I noticed that at one portion of the form it says that it gave me the impression that the Board had the option to send your student to any school that it so desired, and it was my idea to have my child in the school nearest to his home.

Q. That was your reason for not executing the form?
A. That's right.

Q. If the Court please, we would like to offer into evidence the form that was given to Mr. Eldridge by Mrs. Vance. Any objection?

THE COURT: Is there any objection to it?

MR. BALL: No, sir.

THE COURT: Let it be admitted.

THE CLERK: Plaintiff's No. 1.

(The Clerk so marked the form as Plaintiff's Exhibit No. 1 in evidence.)

MR. BROWN: Plaintiff's Exhibit No. 1.

BY MR. BROWN:

Q. Mr. Eldridge, did there come a time when you presented your child to any other school in Arlington County?
A. Yes, I did on the opening day of school. I decided to go to the nearest school to my house, which was a block

(tr 25) and a half. It is known as the Fillmore Elementary School. It is located on Fillmore Street and I took my boy there and I was met at the door by a Mrs. Smith, who told me that I would have to—I think her reason, she told me that I would have to go to the Clay Elementary School to register my boy which was at—

THE COURT: Have to go where?

THE WITNESS: To the Clay Elementary School, located at Seventh and Holland Street, North Arlington. She stated her reason for sending me there was because she didn't have any more placement forms, so I proceeded to go to this school at Seventh and Holland Street where I asked could I register my boy to go to the school nearest his home, and I was told that I would have to fill out placement forms.

BY MR. BROWN:

Q. Was this the opening day of school?

A. That's right. At that time I did take my, the birth certificate of my child, and his former record of his school that he previously attended.

Q. You had those with you?

A. On each occasion.

Q. Each occasion?

A. Each occasion I had that with me.

* * *

(tr 27) * * *

Q. Mr. Eldridge, did you do anything else in order to get your child into school?

[redacted]

A. Yes, I wrote a letter to the Superintendent. I wrote

[redacted]

Q. [redacted]

A. [redacted]

Q. Do you know, did you receive any response to that

letter?

(r 32) A. Yes, I did.

Q. [redacted]

A. [redacted]

Q. [redacted]

A. [redacted]

Q. [redacted]

A. [redacted]

(r 33) • • •

Q. Where is the Fillmore School in relationship to your

[redacted]

[redacted]

[redacted]

THE COURT: [illegible]

Testimony of Arthur M. Cooley, Sr.

(tr 82) * * *

Testimony of T. Edward Rutter

Superintendent of Schools, Arlington

Q. Now you say it is a junior-senior high school. What grades does that school have?

A. Sixth through twelve.

Q. And which of those grades are junior high school grades and which are senior high school grades?

A. Six through nine are junior high school, and tenth through twelve are senior high school.

Q. Now let me clear this up. Under your Arlington School System the first six grades are elementary school grades. Am I correct in that regard?

A. That's correct.

Q. And grades seven through nine are the junior high school grades?

A. That's correct.

Q. And nine through twelve are the senior high school grades?

(tr 113) A. Right.

Q. That is true in both Negro and white schools?

THE COURT: Ten through twelve, is it not?

THE WITNESS: Ten through twelve.

MR. ROBINSON: I'm sorry.

BY MR. ROBINSON:

Q. Is there any other Negro senior high school facility in Arlington County other than a part of the Hoffman-Boston facility?

A. No.

Q. Is there any other Negro junior high school facility in Arlington County other than a part of the Hoffman-

Boston facility?

A. No.

Q. Is Hoffman-Boston more than a single school plant or is it within itself a single educational unit and in a sense that it is a single building?

A. It is a single coordinated educational unit.

Q. How many buildings?

A. Well, there is really one building, although we have a temporary structure situated within about twenty feet of the building so there actually are two buildings on the site.

Q. And what is this temporary structure being used for?

A. Well, it has been used from time to time for various (tr 114) purposes. I believe most recently for art and music.

Q. How temporary is this structure? By that I mean how long has it been used for these various purposes?

A. I don't know the number of years but I can say it has been used for this purpose since I have known the school in 1950.

Q. Since 1950?

A. Yes.

Q. At least for the period of the last six or seven years?

A. Yes.

Q. All right. Now what are the names of the three remaining Negro schools in Arlington County, all of which are elementary schools?

A. The first is Hoffman-Boston Elementary School, located very close to the Hoffman-Boston Junior-Senior High School. The other is the Drew Kemper School, composed of two school buildings but is administered as one elementary school, and the last is the Langston Elementary School.

Q. All right, sir. Now without undertaking to name them, how many high school facilities do you have in Arlington County attended exclusively at the present time by white students?

A. Two.

Q. What are the names of those two schools?

A. Washington-Lee High School and Wakefield High School.

(tr 115) Q. And how many presently all-white junior high school facilities in the county?

A. May I name them one at a time because I'm not sure that I can give you the exact number?

Q. Surely.

A. In the northern part of the county we have Williamsburg, Stratford, Swanson; in the central part of the county we would have Thomas Jefferson and in the southern part of the county Kenmore, and a new junior high school presently organized this year which will be known as the Gunston Junior High School.

Q. How many?

A. I believe that was seven, was it not?

Q. Seven. Do you recall the exact number—

THE COURT: Let us see. I have six, Williamsburg, Stratford, Swanson, Jefferson, Kenmore, and Gunston.

THE WITNESS: I'm sorry. That is right.

THE COURT: Six?

THE WITNESS: I believe that is correct.

BY MR. ROBINSON:

Q. How many all-white elementary schools do you have?

A. I do not know the precise number, sir, but it would be approximately thirty-seven or thirty-eight.

(tr 116) Q. All right, sir. Now, Mr. Rutter, are you familiar with that map that is posted on the board over there?

A. Very familiar.

Q. Have you had an occasion to examine that map to be in a position to tell me whether or not it is accurate in so far as the location of your schools are concerned and the boundaries, of the present boundaries of your school districts?

A. I believe that it is, sir.

Q. Would you walk over to the map and examine it and state to me positively, if you can, whether or not it does accurately disclose the location of schools and school boundaries?

A. Yes, I believe that it does.

Q. How many school districts do you have as shown on that map, Mr. Rutter?

A. This map is an attempt to demonstrate and show the number of secondary school districts. We have a similar map showing the elementary districts.

Q. Might I ask you this. When you say secondary, do you include only the senior high schools or do you include the junior high schools as well?

A. That's right.

Q. Junior high school, junior and senior?

A. That's right.

Q. All right. Now how would, how many senior high school districts do you have?

(tr 117) A. Three.

Q. Would you name them, please?

A. Hoffman-Boston, Washington-Lee and Wakefield.

Q. Are these school districts in each instance all located in a geographically contiguous fashion or do you have any instance of a school district being divided into two or more parts and the parts not being geographically contiguous?

A. We have one like the last you have just described.

Q. All right, and which one is that?

A. Hoffman-Boston.

Q. All right. What is the difference, if any, between the school districts so far as the racial classification of the student residing in those districts may be concerned?

A. The Hoffman-Boston District is designated as a district for our colored boys and girls on the high school level.

Q. And for that purpose only, am I correct?

A. That is correct.

Q. In assuming.

And that district I understand you to say has two parts?

A. That's correct.

Q. Would you show me those two parts?

A. (Pointed.)

(tr 118) THE COURT: Would you refer to, for the purposes of the record—call one of them north?

THE WITNESS: For the purpose of the record the northern section is just south of Lee Highway, the southern section is that portion of land surrounding the Hoffman-Boston Junior-Senior High School.

BY MR. ROBINSON:

Q. Now the Hoffman-Boston Junior-Senior High School is physically located within the southern of the two Hoffman-Boston School Districts?

A. That's right.

Q. There is no Negro junior or senior high school facility geographically situated within the boundaries of the northern Hoffman-Boston School District?

A. That's correct.

Q. How much distance would you say there is approximately between the northern and the southern, say, estimating as best you can from, say, the geographical centers of those districts, how much distance would you say that there is approximately between the northern and the southern sections of the Hoffman-Boston School District?

A. Well, I would judge it to be approximately five miles. I believe the total distance from the northern part of the (tr 119) county to the southern is seven and it would appear to me would be about five, five and a half or six miles.

Q. Is there any other district in Arlington County at the secondary level embracing Negro students other than the Hoffman-Boston School District?

A. No.

Q. Now, and that is true with reference to the junior high schools as well as the senior high schools?

A. That is correct.

Q. Come back up here.

Now as I understand you, Mr. Rutter, the Hoffman-Boston School District with its two parts for secondary students is based entirely upon the race of the student residing for school administrative purposes within those dis-

tricts; am I correct in that?

A. I believe that is correct.

Q. All right. Now how do you figure out school districts for white students in Arlington County?

A. It is done in terms of the capacity of buildings to house a given number of children.

in a number of instances I believe, in the past, of course, in schools happened quite by schools that are not necessarily the closest to their place of residence.

Q. [illegible] that is true of the school that the [illegible] attends, or that their parents [illegible] have children in some part of all of Arrington in that elementary school district?

A. [illegible]

Q. [illegible] this [illegible] with this [illegible] Arrington [illegible] in the [illegible] in the [illegible] in this [illegible]

A. [illegible]

Q. All right. Now, Mr. Brown, do you happen to have with you a map showing the elementary school districts of Arrington County?

A. Yes, I do.

Q. Do you have one that we might [illegible]

A. Yes.

Q. Perhaps from you for purposes of putting in the record [illegible] the understanding that you might use it [illegible]

A. Very good.

Q. All right, sir.

Anybody want to see this?

Mr. [illegible], I hand you this document and I ask you to examine it and identify it [illegible] (Handed)

A. This is a map of Arrington County as [illegible] has been (tr 122) superimposed thereon [illegible] the various elementary school districts.

[redacted]

A. That's right.

[redacted]

Q. Local Board anything to do with making up this year's maps?

A. We have not made any map this year, sir, inasmuch as we no longer, of course, have any jurisdiction in the placement of children in the schools so we have not made the maps this year.

THE COURT: You mean by that there are for this session no district, school districts in Arlington County?

THE WITNESS: The districts are, sir, those that are shown or the map, but the map is last year's map and we have made no changes in the map this year.

THE COURT: Well, do you still observe these district lines for any purpose whatsoever?

THE WITNESS: Well, presumably they are observed (tr 133) by the Pupil Placement Board, sir.

MR. ROBINSON: Mr. Rutter, by that do you mean that the Pupil Placement Act had the effect when it went into operation, had the effect of freezing all students, white and Negro, in the schools that they were attending on the effective date of the Act, is that what you have reference to in your last answer to the Court's question?

THE WITNESS: That the description that you have just given seems to me to be quite similar to a clause or a sentence or two, a paragraph in the law itself.

MR. ROBINSON: By that I mean and I am trying to find out now what the actual operation of this thing has been in Arlington County when the law went into effect, it had the effect in your interpretation of it, it had the effect of keeping all students in the, who were in school, in the schools that they attended when the law went into effect, of keeping them there unless the Pupil Placement Board

transferred them to some other school?

THE WITNESS: That is my understanding.

(tr 134) MR. ROBINSON: Are you familiar with the actionable results of assignments of Arlington school children made by the Pupil Placement Board? I mean do you know in a general sort of way whether or not so far as the students are concerned the Pupil Placement Board has generally observed the old 1956-57 school district lines in making its own assignments in those instances where it has made assignments?

THE WITNESS: That would be my general observation. Of course, I couldn't be familiar with all the forms and it is perfectly possible that some children who may have attended a given school last year were not assigned to the same school this year.

MR. ROBINSON: But so far as you know, the statement that I just made is correct?

THE WITNESS: I believe that is correct.

MR. ROBINSON: Do the school authorities or the Principals or any other agents, employee or representative of the School Board, or Division Superintendent of Arlington County make any recommendations to the Pupil Placement Board as to the school that a child should be assigned (tr 135) to?

THE WITNESS: Absolutely not.

MR. ROBINSON: That is all.

MR. HILL: Let me see the plaintiff's Exhibit 5, I think it is.

MR. ROBINSON: Mr. Rutter, of course, you are familiar with this form, are you not?

THE WITNESS: Indeed I am, sir.

MR. ROBINSON: I am calling your attention to a section of the form that reads as follows: Information and recommendations from local school board, if child is entering school for the first time is date of child—wait a minute. No, I beg pardon. Right under that, big bold faced heading that I have just read to you, the third printed line down, recommend to school to which pupil should be assigned. Am I correct in understanding from what you have just said that your employees in Arlington County do not make a recommendation to the Pupil Placement Board as to the school to which a particular student should be assigned as is requested by that form?

(tr 136) THE WITNESS: That is correct. We do not, and we did not on that form.

MR. ROBINSON: That is all. Thank you, Mr. Rutter.

* * *

THE COURT: Let me ask Dr. Rutter one question. Doctor, will you stand right up where you are?

Are you familiar with these seven instances that students' (tr 137) applications, that we are considering today?

THE WITNESS: Yes, sir.

THE COURT: To your knowledge was any one of them disqualified by reason of his scholastic records to enter the school to which he applied?

THE WITNESS: I would have no way of knowing that, Your Honor. In other words, I didn't attempt to secure that information.

THE COURT: You cannot answer that?

THE WITNESS: No, sir.

THE COURT: All right.

No. 887 SUPREME COURT, U. S.

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BRIEF AND APPENDIX
ON BEHALF OF APPELLANTS

United States Court of Appeals for the Fourth Circuit

No. 7543

COUNTY SCHOOL BOARD OF ARLINGTON COUNTY, VIRGINIA AND T. EDWARD RUTTER, DIVISION SUPERINTENDENT OF SCHOOLS OF THE COUNTY OF ARLINGTON, VIRGINIA,

Appellants

v.

CLARISSA S. THOMPSON, ET AL.,

Appellees

Appeal from the United States District Court for the Eastern District of Virginia, Alexandria Division

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
THE QUESTIONS INVOLVED	3
Point I	3
Point II	3
Point III	3
Point IV	3
STATEMENT OF FACTS	4
Specific Steps Taken by Each of the Plaintiffs	4
The Court Ignored School District Lines	7
Plaintiffs Are Not Entitled to Enter a Particular School Simply Because It Is the Nearest	8
ARGUMENT	9
I. The Proceedings Were Prematurely Heard and Tried, Without Adequate Notice, and in Violation of the Federal Rules of Civil Procedure and the Rules for the Eastern District of Virginia	9
II. The Defendants Were and Are Without Authority to Admit or Enroll the Plaintiffs in Any School of Arlington County by Reason of the Pupil Placement Act, Chapter 70, Extra Session, 1956	13
III. Neither the Allegations of the Motion for Further Relief, Nor the Proof Offered, Was Sufficient to Justify the Relief Granted	15
IV. If the Placement Act Is Void in Its Entirety, These Defendants Should be Given an Opportunity to Exercise Their Judgment in Making the Assignments Before the Federal Court Exercises That Function of Local School Administration	16
CONCLUSION	17

Page

Appendix:

I. Motion to Modify Injunction Decree ..... App. 1

II. Court's Memorandum on Motion to Amend Decree, dated July 27, 1957 ..... App. 2

III. Court's Order on Motion to Amend Original Decree, dated July 29, 1957 ..... App. 4

IV. Plaintiffs' Motion for Further Relief, filed September 9, 1957 ..... App. 5

V. Plaintiffs' Motion to Intervene, filed September 9, 1957 ..... App. 6

VI. Plaintiffs' Complaint in Intervention, Filed September 9, 1957 ..... App. 8

VII. Court's Order for Hearing on Motion for Further Relief, dated September 9, 1957 ..... App. 11

VIII. Court's Order on Motion to Intervene, Entered September 9, 1957 ..... App. 12

IX. Defendants' Motion to Dismiss the Motion for Further Relief ..... App. 13

X. Defendants' Motion to Continue Hearing on Plaintiffs' Motion for Further Relief, Filed September 11, 1957 ..... App. 15

XI. Defendants' Motion to Vacate Order on Motion to Intervene, Filed September 11, 1957 ..... App. 16

XII. The Court's Findings of Fact and Conclusion of Law, Dated September 14, 1957 ..... App. 18

XIII. The Court's Supplemental Decree of Injunction, Entered September 14, 1957 ..... App. 26

XIV. Defendants' Notice of Appeal, Filed September 16, 1957 ..... App. 27

Page

XV. Excerpts from Reporter's Transcript ..... App. 20
A. Testimony of Harold M. Johnson ..... App. 20
B. Testimony of Robert A. Eldridge ..... App. 22
C. Testimony of Dorothy P. Nelson ..... App. 25
D. Testimony of Arthur M. Cantley, Sr. ..... App. 26
E. Testimony of Dorothy M. Hannas ..... App. 28

XVI. Rulings of the Court ..... App. 29

TABLE OF CITATIONS

Cases

DeFebio v. County School Board of Fairfax County 14

New v. Atlantic Greyhound Co., 186 Va. 726 14

School Board of Newport News v. Atkins, 246 F. (2d) 325 14

Other Authorities

Acts of the General Assembly, Extra Session, 1956:
Chapter 70 13

Constitution of the United States:
Fourteenth Amendment 11

82 C. J. S., Statutes, Sec. 93 14

Federal Rules of Civil Procedure:
Rule 64 10
Rule 12(b)(6) 11
Rule 23 12
Rule 26c 10

Rules for Eastern District of Virginia:
Rule 13 10

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Appellants

v.

CLARISSA S. THOMPSON, ET AL.,

Appellees

Appeal from the United States District Court for the Eastern District of Virginia, Alexandria Division

BRIEF ON BEHALF OF APPELLANTS

STATEMENT OF THE CASE

This case was heard by the court below on September 11, 1957, upon the appellees' Motion for Further Relief in connection with the injunction granted by order dated July 31, 1956, restraining and enjoining the appellants from enforcing and pursuing the policy and practice of segregating, on

NOTE: Throughout this brief, the appellants are sometimes referred to as defendants, and the appellees are sometimes referred to as plaintiffs.

the basis of race or color, the children attending the public schools of Arlington County. That order was affirmed by this Court and certiorari was denied by the Supreme Court of the United States. See, 240 F. (2d) 59 (1956); ..... U. S. ....., 77 S. Ct. 667, 1 L. Ed. (2d) 664 (1957).

In July, 1957, the plaintiffs filed a Motion to Modify Injunction Decree seeking an order specifying that the plaintiffs would not have to comply with the requirements of the Virginia Pupil Placement Law, enacted in September, 1956 (Appellants' App. I). This was denied on July 27, 1957 (Appellants' App. II), and the district court's order was entered on July 29 (Appellants' App. III).

Thereafter, three of the infant plaintiffs filed on September 9, 1957, their Motion for Further Relief asking for a decree directing the defendants to admit them to the schools in which they allegedly had sought admission. On the same date, four Negro children filed a Motion to Intervene and their Complaint in Intervention, seeking the same relief as prayed for in the Motion for Further Relief (Appellants' App. V and VI). Without notice to the defendants, orders were entered the same day, *ex parte*, granting the intervention (Appellants' App. VIII) and setting September 11, 1957 as the date to hear the Motion for Further Relief on its merits (Appellants' App. VII).

On the said September 11th, the defendants filed the following motions:

1. Motion to Continue Hearing on Plaintiffs' Motion for Further Relief.
2. Motion to Vacate Order on Motion to Intervene.
3. Motion to Dissolve the Injunction.
4. Motion to Dismiss the Motion for Further Relief.

After oral argument, the court below denied the first three motions set forth above but did not, and as yet has not, passed on the defendants' Motion to Dismiss the Motion for Further Relief. Instead, the court immediately proceeded to hear evidence on the plaintiffs' Motion for Further Relief (Appellants' App. XVI).

On September 14, 1957, the court below entered its decree directing that seven plaintiffs be admitted to the schools of their choice.

THE QUESTIONS INVOLVED

Point I

Were the proceedings prematurely heard and tried, without adequate notice, and in violation of the Federal Rules of Civil Procedure and the Rules for the Eastern District of Virginia?

Point II

Is the Pupil Placement Act (Chapter 70, Acts of Assembly, Extra Session, 1956) valid insofar as it divests the defendants of power and authority to admit or enroll pupils in the public schools of Arlington County and vests such power in the Pupil Placement Board?

Point III

Were the allegations of the Motion for Further Relief and the testimony in support thereof, sufficient to justify the Court in placing the plaintiffs in the schools to which they sought enrollment?

Point IV

If the Placement Act be void in its entirety, should the local school authorities be given an opportunity to exercise

their judgment in passing upon requests for enrollment into specific schools before the Federal Court exercises such function of school administration?

STATEMENT OF FACTS

The Arlington school system is divided into elementary and high school districts. It consists of approximately 40 school buildings. It has an enrollment of 1,432 Negroes and 21,245 whites. There is one combination junior and senior high school for the Negroes and there are two senior high schools and six junior high schools for the whites. There are three elementary schools for the Negroes and 27 for the whites. The elementary schools are divided into 33 districts, of which there are three for the Negroes and 30 for the whites. Both high school and elementary districts are shown on the plats which were filed as exhibits in the court below. Heretofore, the school system has been operated on a segregated basis in obedience to the law of Virginia.

Specific Steps Taken by Each of the Plaintiffs

Of the seven plaintiffs involved two, Harolyn Johnson and Rita Johnson, are the children of Dr. Harold M. Johnson of 2901 North Lexington Street, in Arlington. On the opening day of school, he presented them at Washington-Lee High School for entry in the senior and sophomore years, respectively. Washington-Lee High was about 2½ miles distant from his home. Upon arrival at the school, he spoke with the principal and was told that in view of the fact that his children were entering the Arlington system for the first time, pupil placement forms would have to be signed and filed either with the school or the Pupil Placement Board and the address of the latter in Arlington was given him. No mention of race, color or qualification was

made and no refusal or objection of his children's entering the Arlington school system was offered nor was there any discussion of available facilities or transportation. He made no objection to the procedure indicated and taking the forms with him he stated to the principal that he would talk it over with his wife and decide what to do and left. Nothing was said to indicate he was being treated any differently than a white person who was applying under the same circumstances. He never returned to the school, nor sent the forms in, nor did he communicate in any way with the Pupil Placement Board or the school authorities. He had his children admitted as intervening plaintiffs in this suit two days before trial. Dr. Johnson's controlling reason for asking admission to Washington-Lee High was that it was a little nearer than Hoffman-Boston High although he attempts to widen this somewhat by claiming he wanted his children to have four years of high school Latin. Without impugning his motives, nevertheless, it is fair to say that it can be easily deduced from the circumstances disclosed by the evidence that his real reason for presenting his children to Washington-Lee High was to add his prestige to the plaintiffs in this suit by asserting a right of entry he never intended to exercise.

The next plaintiff mentioned in the evidence was Robert A. Eldridge, III, son of Robert A. Eldridge, Jr., of 2716 1st Street, South, Arlington. On August 15th, the day for entering children who had not previously been entered in the Arlington school system, the father went to Patrick Henry School and was told by a Miss Vance that he would have to fill in a Pupil Placement form. He did not take the form then, but returned an hour later and picked up a form and said he would talk it over with his wife and decide whether to return it. He never executed the form. He wanted his child placed in the school nearest his home and thought if he signed the form, the Pupil Placement Board

would place him somewhere else. He went to the School Board headquarters and discussed the matter there and was told to fill in the form. On the opening day of school, he presented his child to Fillmore School and was told to go to Clay School, as they had run out of pupil placement forms at Fillmore. At Clay, he was again told to fill in the form. On this second go round, he had the forms in his pocket but did not mention that fact at either Fillmore or Clay. No mention of race was made at any of the interviews. The only thing mentioned by the authorities was that he would have to fill in the form. He and his wife decided not to fill it in and he never did execute it and never gave any information to the effect he was not going to do so to any school authority. All he did was state he wanted his child entered in the nearest school.

The next plaintiff mentioned in the evidence was George Tyrone Nelson, son of Dorothy P. Nelson of 2005 North Cameron Street, Arlington, who had been a student at Hoffman-Boston High for three years and was assigned back there for another year. Mrs. Nelson allegedly made application for entrance to Stratford Junior High by filling in the pupil placement form, without mentioning that the child was already enrolled at Hoffman-Boston, or where she desired the child to attend. She made out no transfer application. On opening day a white woman named Davis took the child first to Stratford and was refused admission because he had not been assigned there, and then took him to Hoffman-Boston where he was entered and was in school at the time of the hearing. No mention was made of color or race by anyone in the entering application or requests or by any school authority involved.

The next plaintiffs mentioned were Louis G. Turner and Melvin H. Turner of 5132 North 22nd Street, Arlington. They are the stepchildren of Arthur M. Costley, who testi-

find that their mother took them to Swanson Junior High School in August and was given pupil placement forms which the school authorities filled out for her. She brought them home and she and her husband decided not to sign them. Neither these forms nor any transfer application was ever signed. He took the children to Swanson Junior High on opening day and was told again that they could not be admitted unless pupil placement forms were signed and then took them to Hoffman-Boston High and entered them. The only reason given for having them entered at Swanson was that it was the nearest school.

The last of the plaintiffs was Leslie Hamm, Jr., son of Dorothy M. Hamm of 1900 North Cameron Street, Arlington. The child had finished the elementary grades in Langston School in the Hoffman-Boston district and applied in August for admission to Stratford Junior High which the parents thought was the nearest of the Junior Highs. The principal told them they would have to fill out a pupil placement form which they never did. They never communicated further with the school authorities except by letter to the School Superintendent which the mother said was intended to "make it a matter of record". No mention of race was made at any time. On opening day a white woman by the name of Davis took the boy to Stratford Junior High where he was denied admission. No reason other than failure to sign a pupil placement form was given for the refusal.

The Court Ignored School District Lines

The Arlington County school system, both elementary and high, is divided into school districts. The Hoffman-Boston High School District, for both junior and high, is in two segments some distance apart. North of the north segment of this district is the Williamsburg Junior High District;

East of it is Stratford Junior High District, and South and West of it is Swanson Junior High District. The court order took George Tyrone Nelson, who lived in the north segment of the Hoffman-Boston High School District and who had been attending Hoffman-Boston Junior High for three years, out of that district and placed him in Stratford Junior High, thus breaking down the district lines without abolishing the Hoffman-Boston district in violation of the rules and regulations of the School Board to the effect that each child should attend school in the district of its resident. The same order took Louis G. Turner and Melvin H. Turner, who lived in the north segment of the Hoffman-Boston High district and had been attending Hoffman-Boston High (and who were neighbors of George Tyrone Nelson) out of the Hoffman-Boston district and placed them in Swanson Junior High. The districting as laid out on the exhibit map has never been voided or declared illegal by any court and the school authorities could not violate their own rules and regulations of attendance in the respective districts so long as the districts themselves were left intact and above all they could not take one child out of Hoffman-Boston district and place him in Stratford, and two others and place them in Swanson, at the same time leaving the boundaries of all districts intact.

Plaintiffs Are Not Entitled to Enter a Particular School Simply Because It Is the Nearest

Another fact of importance is that children are not assigned to the school nearest their residence, but are only assigned to the school in the district of their residence. In placing the colored children in schools nearest their residence the court order discriminates against white children who do not have such privilege. For instance, children living

along the east side of Glebe Road at North 16th Street are only a block and a half from Woodlawn School but because they are in the Page School district they are required to go some thirteen or fourteen blocks to the Page School. Children living near the County line along North Montague Road are required to go some ten or twelve blocks to Stonewall Jackson School, when both Ashlawn and Glencarlyn Schools are much closer. Children living only a block and a half from Yorktown School are required to go three or four times that far and attend Jamestown School. Children facing on the south side of Lee Highway near Lexington Street have the Robert E. Lee School at their door, while those on the other side of the road are compelled to go seven or eight blocks to the Nottingham School.

The elements considered in laying out school districts were not fully developed in the evidence but certainly the boundaries are not to be broken down in order to place two or three children in their nearest schools.

Hoffman-Boston is not the only district in segments. Ashlawn has two segments not adjoining each other. For some purposes, Nottingham District has three segments.

ARGUMENT

I.

The Proceedings Were Prematurely Heard and Tried, Without Adequate Notice, and in Violation of the Federal Rules of Civil Procedure and the Rules for the Eastern District of Virginia.

This was true in the following instances:

1. An order permitting the intervention of Harolyn Johnson, Rita Johnson, Robert A. Eldridge, III and George Tyrone Nelson, infants, and their respective parents, was

entered September 9, 1957, *ex parte*, without any notice to the defendants whatsoever. This was contrary to Rules 24c and 6d of the Federal Rules of Civil Procedure, there being no cause alleged or found by the Court for such *ex parte* hearing. In fact, it would appear from the notice (dates blank) attached to the Motion to Intervene that the plaintiffs recognized the propriety of giving notice of such motion.

2. The Motion for Further Relief was filed on the morning of September 9, 1957, without prior notice to the defendants; the hearing on the motion was set for 10:00 a. m. on September 11 without consultation with or notice to the defendants; notice of the hearing and copies of the motion were served on local counsel for the defendants at 4:25 p. m. on September 9, leaving just one working day for preparation; no facts were alleged or cause shown why the Court should not grant the usual five day notice pursuant to Rule 6d of the Federal Rules of Civil Procedure; and Rule 13 of the Rules for the Eastern District of Virginia was ignored. The latter rule reads, in part, as follows:

> "2. That with all motions there shall be filed and served a statement, with appropriate references, of the statutes, rules or authorities, if any, upon which the movant will rely, and that not less than 2 days before the return day of the motion, the respondent shall file and serve upon the movant a like statement of the statutes, rules or authorities, if any, upon which the respondent will rely in opposing the motion."

3. On the morning of September 11, after denying (a) the defendants' motion to continue, (b) the defendants' motion to vacate the order permitting intervention, and (c) the defendants' motion to dissolve the injunction, the District Court immediately proceeded to take testimony and

pass upon the prayers of the plaintiffs' Motion for Further Relief, without first passing upon the defendants' motion to dismiss the same and without any opportunity being afforded the defendants to answer said Motion for Further Relief. Because the defendants had not previously concerned themselves with making assignments and had no information as to the propriety of the enrollment sought, adequate time, after ruling on the legal sufficiency of the motion, should have been afforded to the defendants to gather pertinent facts. Under the circumstances, the defendants had no testimony to offer.

Although designated "Plaintiffs' Motion for Further Relief," the pleading was in reality an original complaint by each of the seven colored children (four of whom were strangers prior to September 9 to any litigation affecting their rights to attend school) alleging that they, as particular individuals, had been denied admission to the public schools of Arlington in violation of the 14th Amendment. The fact that the plaintiffs sought to use the original class action as a vehicle is no reason to deny the defendants due process of procedural law, as embodied in the Federal Rules of Civil Procedure, namely, to have the sufficiency of the complaint tested by a motion to dismiss (Rule 12(b)(6)), to be thereafter allowed ten days to answer the motion and raise issues of fact (Rule 12 (a)); and to then try the issues of fact after reasonable time for preparation. On the contrary, these seven children filed their complaint and concluded the trial thereon in less than three days without any answer thereto having been filed. The Federal Rules of Civil Procedure make no distinction as to the color or race of the litigants. Yet that very effect was obtained in this instance: a so-called class action was brought wherein all Negro school children in Arlington County, present and future (even per-

sons yet unborn) may bring their complaints without twenty days' notice to the defendants, without having the legal sufficiency of the complaint tested before a trial on the facts, and without having their cases placed on the docket for trial in due course.

This novel and discriminatory result has been achieved by prosecution of a "class-action" suit. It is submitted that no such result was contemplated by Rule 23. The Rule contemplates that where a class is numerous, one or more persons may, on behalf of all, sue "when the character of the right to be enforced for or against the class is * * * (3) several, and there is a common question of law or fact affecting the several rights *and a common relief is sought.*" (Italics supplied.) The plaintiffs recognized and alleged this in their original complaint as justification of the class action. An injunction was obtained for the benefit of the class and this has become final. But now there is no basis for a class action in enforcing the claims of the *individual* or several members of the class because there is no common question of fact relating to all members of the class, or even to the seven individual pupils involved in this appeal; and no common relief is sought. While the question of fact in the case of each of the seven children is: "Was he denied admission because of race or color," there must be an individual determination as to each one. Assume there had been discrimination as to one but not as to the others: this would not justify the requiring of all seven to be admitted to the schools of their choice; and conversely, the denial of relief as to the six would not justify denial of relief to the seventh. Thus no "common relief" is sought as is required by Rule 23.

The very fact that Harolyn Johnson, Rita Johnson, Robert A. Eldridge, III and George Tyrone Nelson, infants, found it necessary to intervene demonstrates that common relief is not sought. The concept of a class action is that one

or a few obtain a judicial determination for the benefit of all in the class.

The individual nature of the specific complaints of the plaintiffs was noted by the District Court in the memorandum accompanying the order of July 27, 1957, when it was said:

> "If and when there are complaints of violations of the decree, the court will then inquire if the complainant has first submitted, or has adequate means of submitting, his grievance for correction administratively. At that time it will weigh the complaint and any administrative action taken thereon, to ascertain whether the decree has or has not been followed, and if not, the reason for the failure. Thereupon it will make such further order as is appropriate. In this way specificity and precision will be given to each complaint, it will be individualized, and it will be appraised in its own peculiar environment, of course in the light, too, of the regulations and precedents then at hand." (Appellants' App. II)

The individual complaints here involved are foreign to the principle of a class action. Being complaints of denial of constitutional rights, based on the peculiar facts relating to each individual plaintiff, such complaints should follow the procedure required in individual civil suits, and the defendants are entitled to such procedure.

II.

The Defendants Were and Are Without Authority to Admit or Enroll the Plaintiffs in Any School of Arlington County by Reason of the Pupil Placement Act, Chapter 70, Extra Session, 1956.

Chapter 70 of the Acts of Assembly, Extra Session, 1956, divested local school boards and division superintendents of

all authority to enroll or assign pupils in public schools and placed such authority in a new state agency called the Pupil Placement Board. This Court has held that the administrative remedies to appeal a decision of such Placement Board are not adequate. *School Board of City of Newport News* v. *Atkins*, 246 F. (2d) 325 (1957), cert. den. October 21, 1957.

However, this Court has not held said Act unconstitutional *in toto*. The transfer of enrollment authority from local to state officials is entirely severable and divisible from the administrative remedies which have been found tainted. The legislative intent to transfer such authority can be given effect even in the absence of any administrative remedies. Such transfer of authority can and should be given effect, despite the partial invalidity of the Act. *New* v. *Atlantic Greyhound Co.*, 186 Va. 726, 43 S. E. (2d) 872; 82 C. J. S., Statutes, Sec. 93.

Since no Federal question is involved in transferring such authority, the Federal courts should follow the State law. The precise point is now pending before the Supreme Court of Appeals of Virginia in the case of *DeFebio* v. *County School Board of Fairfax County*, and should be decided before the hearing on this appeal.

If the Placement Act is valid to transfer such authority from the local officials to the Placement Board, then:

1. The Motion to Dissolve the Injunction of July 31, 1956, as modified by the Order of July 27, 1957, should have been granted because the defendants are now without power or authority in the subject matter of the injunction.

2. The Motion to Dismiss the Motion for Further Relief should have been granted because the plaintiffs' motion shows on its face that the plaintiffs refused to make application to the Placement Board for assignment or transfer.

3. The plaintiffs' Motion for Further Relief should have been denied for the reason set out above in Paragraph 2, and for the further reason that the Placement Board was not a party thereto.

III.

Neither the Allegations of the Motion for Further Relief, Nor the Proof Offered, Was Sufficient to Justify the Relief Granted.

The said Motion of the plaintiffs did not allege that any of the seven children had been denied admission to the schools on account of race or color. And each of the plaintiffs' witnesses admitted that race or color played no part in the denial of admission—it was solely because the parents refused to make written application for admission as required by the Placement Board, except in one case (George Tyrone Nelson) where the assignment was made to a school other than one to which he presented himself, and the parent made no application to anyone for a transfer from the assigned school (Tr. Johnson, p. 8, *et seq.*; Eldridge, p. 22, *et seq.*, p. 37; Costley, p. 77, *et seq.*, p. 89; Hamm, p. 101).

The plaintiffs' Motion did not allege to which schools the seven children applied, nor did it allege any facts which would entitle the particular children to be admitted to the particular schools applied to. At the trial it was brought out for the first time the various schools to which the seven children had applied; but the only reason given for applying to those schools was that was the nearest to their homes in each instance. It was never shown that a white child had ever had the right to be enrolled in the school nearest his home. Imagine the dislocation, the overcrowding of some schools and classes and the small attendance in others, if white children were granted the same privilege that has been

granted these colored plaintiffs—to attend the school nearest his home, with no other factors whatsoever being considered.

IV.

If the Placement Act Is Void in Its Entirety, These Defendants Should be Given an Opportunity to Exercise Their Judgment in Making the Assignments Before the Federal Court Exercises That Function of Local School Administration.

The placement of pupils is an administrative function, and should not be undertaken by the Federal Courts unless and until it is clear that the proper school authorities either refuse to do so, or do so illegally. Being agents of the Commonwealth of Virginia, these defendants are under a duty to comply with State laws until such laws are held invalid by a final judgment. When the judgment here appealed from was entered on September 13, 1957, there had been no such final judgment outlawing the Placement Act. Further than that, on July 27, 1957, the District Court in this very case denied as premature a motion of the plaintiffs which would have permitted them to by-pass the Placement Act (Appellants' App. III), by which action the Court impliedly, if not specifically, directed these defendants to follow said Act until ordered otherwise. In obeying the Placement Act the defendants kept hands off all matters relating to the assignment and enrollment of pupils for the September 1957 term. Any decision completely invalidating the Placement Act, should provide for an orderly transition in revesting the enrollment functions in the local authorities and permit such local authorities to weigh factors and problems not before the Court such as relative achievement levels, proper distribution of school population into school districts, transportation, efficient use of school buildings and person-

nel, and others. The interest of the public in having an orderly school system administered by school officials would seem to outweigh the interest of the seven plaintiffs in getting in a desegregated school a few weeks sooner.

CONCLUSION

In order to resolve doubts which now exist, this Court should either unequivocally declare the Placement Act invalid in its entirety, or should clearly define those parts which are valid and those which are not.

If that part of the Act is valid which divests local school officials of placement power and authority and vests it in a State Placement Board, then this Court should reverse the judgment of September, 1957 and dismiss the injunction herein.

If the Placement Act is void in its entirety, then this cause should be reversed and the Motion for Further Relief dismissed for failure to establish a right to the relief prayed for; or it should be reversed and remanded with instructions to permit the defendants to pass upon the applications of the seven plaintiffs for enrollment; or in any event to give the defendants an adequate opportunity to present evidence against the enrollments demanded by the plaintiffs.

Respectfully submitted,

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Dated: December 5, 1957

I.

MOTION TO MODIFY INJUNCTION DECREE

Plaintiffs move the Court to modify the decree entered in this action on the 31st day of July, 1956, in the following particulars:

1. By deleting the words "at the beginning of the second semester of the 1956-57 session, to-wit, January 31, 1957," following the words "elementary schools" in the paragraph thereof numbered 3, or by such other changes in the language of said paragraph as may be necessary to make said injunction effective in respect to elementary schools at the commencement of the regular session for 1957-58 in September, 1957.

2. By addition of a proviso to the paragraph thereof numbered 4 specifying that the provisions of said paragraph do not necessitate compliance with the requirements sought to be made by Chapter 70, Acts of Assembly, Extra Session 1956, Virginia Code, 1950, Sections 22-232.1 to 22-232.16, inclusive.

3. By addition of a provision specifying that plaintiffs recover from defendants their costs in this action accruing in this Court, the United States Court of Appeals for the Fourth Circuit, and the Supreme Court of the United States.

4. For such other changes in said decree as may be necessary or appropriate to the accomplishment of either of the purposes aforesaid.

.....

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Counsel for Plaintiffs

II.

COURT'S MEMORANDUM ON MOTION TO AMEND DECREE

(Dated July 27, 1957)

I. To render it current, the decree of July 31, 1956 will be amended so that its injunction will become effective in respect to elementary schools at the commencement of the 1957-1958 session in September 1957. This date has heretofore been fixed, and should stand, for the inception of the injunction in regard to secondary schools. Deferment of its effectuation, asked by the defendants, is not warranted in the circumstances of this case.

Specifically, the defendants request suspension of the injunction while review is sought in the Supreme Court of the recent adverse judgment, in other litigation, of the Court of Appeals for this circuit upon the Pupil Placement Act of Virginia. Declaring that the Act does not provide an adequate administrative remedy, the judgment there dispenses with compliance with the Act as a prerequisite to

application to the court for an injunction against the maintenance of segregation. But here the right to an injunction has already been established. Consideration of administrative remedies will not again be reached unless and until petition is made to enforce the injunction. Plainly, therefore, commencement of the restraint laid in the decree should not be postponed to a determination of the validity of an administrative remedy.

If and when there are complaints of violations of the decree, the court will then inquire if the complainant has first submitted, or has adequate means of submitting, his grievance for correction administratively. At that time it will weigh the complaint and any administrative action taken thereon, to ascertain whether the decree has or has not been followed, and if not, the reason for the failure. Thereupon it will make such further order as is appropriate. In this way specificity and precision will be given to each complaint, it will be individualized, and it will be appraised in its own peculiar environment, of course in the light, too, of the regulations and precedents then at hand.

II. The court must deny the plaintiffs' request that the decree be enlarged to include a declaration paralleling the ruling of the Court of Appeals, in effect allowing students to bypass the Pupil Placement Act. The sufficiency of the Act has not been previously an issue in this suit and is now advanced prematurely. Also, a ruling on it now would be unwise, because for neither party is it in an appealable posture. Finally, the holding of the Court of Appeals is in abeyance pro tempore.

With propriety, however, we can observe that quite obviously the July 31, 1596 decree recognizes only an adequate administrative remedy—one that is efficacious and expeditious, even apart from any question of its constitutionality.

Pursuit of an unreasonable or unavailing form of redress is not exacted by the decree.

III. Statutory costs will be awarded in accordance with the motion.

(s) Albert V. Bryan
United States District Judge

July 27, 1957.

III.

COURT'S ORDER ON MOTION TO AMEND ORIGINAL DECREE

(Dated July 29, 1957)

This action came on to be heard on July 27, 1957, upon plaintiffs' motion to modify the judgment entered therein on July 31, 1956, and was argued by counsel.

Upon consideration whereof, the Court being of opinion, for the reasons stated in the memorandum of the court filed July 27, 1957, that the motion should be granted to the extent hereinafter declared, it is *Adjudged, Ordered* and *Decreed:*

1. That the injunction specified in said judgment become in respect to both elementary and secondary schools effective at the commencement of the regular school term for 1957-1958 commencing in September, 1957;

2. That the plaintiffs recover from the defendants their costs in this action in both this court and the United States Court of Appeals for the Fourth Circuit; and

3. That all other provisions of said judgment shall remain in full force and effect.

(s) Albert V. Bryan
United States District Judge

July 29, 1957.

IV.

PLAINTIFFS' MOTION FOR FURTHER RELIEF

(Filed September 9, 1957)

Plaintiffs, E. Leslie Hamm, Jr., an infant, by E. Leslie Hamm, his father and next friend, Louis G. Turner and Melvin H. Turner, infants, by Phyllis S. Costley, their mother and next friend, move the Court to grant them further necessary and proper relief and, in support thereof, state:

1. Said plaintiffs each made timely application to defendants for admission for the 1957-1958 school session to a public school in Arlington County, Virginia, theretofore and now maintained for and attended by white persons only. Said plaintiffs were each denied admission to such schools on the ground that, by reason of the provisions of the legislation commonly referred to as the "Pupil Placement Act," (Code of Virginia, 1950, Title 22, Chapter 12, Article 1.1, Sections 22-232.1 to 22-232.16, inclusive) defendants lacked authority to admit infant plaintiffs to such schools. Defendants have denied each such plaintiff who has not applied to the Pupil Placement Board of Virginia for assignment to a public school admission to any public school in said County.

2. The Pupil Placement Act is an integral part of a legislative plan to retain segregated public schools in Virginia. It operates conjunctively with Items 133, 134, 137, 138 and 143, Chapter 71, Acts of Assembly, Extra Session 1956, and Sections 22-188.3 to 22-188.15, inclusive, and Sections 22-188.30 to 22-188.40, inclusive, of the Code of Virginia of 1950, to render impossible the elimination of racial segregation in public schools, and to render futile any effort to obtain a nonsegregated public education by pursuing its provisions. In consequence thereof, the Pupil Placement Act

denies infant plaintiffs their liberty without the due process of law, and the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States, and does not afford an administrative remedy that plaintiffs are legally required to exhaust as a condition precedent to seeking relief in this Court.

WHEREFORE, said plaintiffs pray the Court to enter a further decree specifically directing defendants to admit said plaintiffs to the schools to which they, respectively, sought admission as hereinbefore set forth, and such further, other, additional or alternative relief as may appear to be equitable and just in the premises.

(s) Edwin C. Brown
Of Counsel for Plaintiffs

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Counsel for Plaintiffs

V.

PLAINTIFFS' MOTION TO INTERVENE
(Filed September 9, 1957)

The above-named applicants for intervention respectfully move the Court for an order permitting them, as members

of the class on behalf of which this action is brought, to intervene as parties-plaintiff in this action, and permitting their proposed complaint in intervention annexed hereto to be filed, in order to assert the matters set forth therein, upon the following grounds:

1. Applicants for intervention are among those generally classified as Negroes, are citizens of the United States and of the Commonwealth of Virginia, and are residents of and domiciled in the County of Arlington, Virginia. The infant applicants for intervention are within the statutory age limits of eligibility to attend the public schools of said County and possess all qualifications and satisfy all requirements for admission thereto. The adult applicants for intervention are parents of the infant applicants for intervention, and are taxpayers of the United States and said Commonwealth and County. All adult applicants for intervention having control or charge of any unexempted child who has reached the seventh birthday and has not passed the sixteenth birthday are required to send said child to attend school or receive instruction (Code of Virginia, 1950, Title 22, Chapter 12, Article 4, Sections 22-251 to 22-256).

2. Applicants for intervention should be permitted to intervene as parties-plaintiff in this action upon the following grounds:

(a) They are members of the class on behalf of which the original action is brought.

(b) They have a substantial interest in the subject matter of the action.

(c) They will be bound by, and benefit from, any judgment, decree or order entered in this action.

(d) Their interest and the main action have questions of law and fact in common.

(e) Their intervention will not to any extent delay or prejudice the further adjudication of the rights of the original parties.

Wherefore, it is prayed that an order may be entered permitting the above-named applicants for intervention to intervene as parties-plaintiff in this action, and permitting their proposed complaint in intervention annexed hereto to be filed, in order to assert the matters set forth therein.

(s) Edwin C. Brown
Of Counsel for Applicants
for Intervention

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VI.

PLAINTIFFS' COMPLAINT IN INTERVENTION

(Filed September 9, 1957)

1. Intervenors adopt and reassert the allegations of Paragraph 1 of the complaint herein.

2. Intervenors are among those generally classified as Negroes, are citizens of the United States and of the Commonwealth of Virginia, and are residents of and domiciled

in the County of Arlington, Virginia. The infant intervenors are within the statutory age limits of eligibility to attend the public schools of said County and possess all qualifications and satisfy all requirements of admission thereto. The adult intervenors are parents of the infant intervenors, and are taxpayers of the United States and said Commonwealth and County. All adult intervenors having control or charge of any unexempted child who has reached the seventh birthday and has not passed the sixteenth birthday are required to send said child to attend school or receive instruction (Code of Virginia, 1950, Title 22, Chapter 12, Article 4, Sections 22-251 to 22-256).

3. Intervenors adopt and reassert the allegations of Paragraphs 5 to 8, inclusive, of the complaint herein, references there to the infant plaintiffs to include the infant intervenors, and those to the adult plaintiffs to include the adult intervenors, and those to the plaintiffs without specifications to include all intervenors.

4. Each infant intervenor made timely application to defendants for admission for the 1957-1958 school session to a public school in Arlington County, Virginia, theretofore and now maintained for and attended by white persons only. Each infant intervenor was denied admission to such schools on the ground that, by reason of the provisions of the legislation commonly referred to as the "Pupil Placement Act," (Code of Virginia, 1950, Title 22, Chapter 12, Article 1.1, Sections 22-232.1 to 22-232.16, inclusive) defendants lacked authority to admit infant intervenors to such schools. Defendants have denied each infant intervenor who has not applied to the Pupil Placement Board of Virginia for assignment to a public school admission to any public school in said County.

5. The Pupil Placement Act is an integral part of a

legislative plan to retain segregated public schools in Virginia. It operates conjunctively with Items 133, 134, 137, 138 and 143, Chapter 71, Acts of Assembly, Extra Session 1956, and Sections 22-188.3 to 22-188.15, inclusive, and Sections 22-188.30 to 22-188.40, inclusive, of the Code of Virginia of 1950, to render impossible the elimination of racial segregation in public schools, and to render futile any effort to obtain a nonsegregated public education by pursuing its provisions. In consequence thereof, the Pupil Placement Act denies intervenors their liberty without due process of law, and the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States, and does not afford an administrative remedy that intervenors are legally required to exhaust as a condition precedent to seeking relief in this Court.

WHEREFORE, intervenors pray that upon the filing of this complaint, as may appear proper and convenient, this Court advance this action on the docket and order a speedy hearing of the same according to law, and grant to intervenors all the relief prayed for in the motion for further relief filed by original plaintiffs herein.

(s) Edwin C. Brown
Of Counsel for Intervenors

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Counsel for Intervenors

VII.

COURT'S ORDER FOR HEARING ON MOTION FOR FURTHER RELIEF

(Dated September 9, 1957)

Upon consideration of the motion of E. Leslie Hamm, Jr., an infant, by H. Leslie Hamm, his father and next friend; Louis C. Turner and Melvin H. Turner, infants, by Phyllis S. Costley, their mother and next friend; Harolyn Johnson and Rita Johnson, by Harold Johnson, their father and next friend; Robert A. Eldridge, III., by Robert A. Eldridge, Jr., his father and next friend; George Tyrone Nelson, by George M. Nelson, his father and next friend; Harold Johnson; Robert A. Eldridge, Jr.; and of George M. Nelson that the court enter a further decree specifically directing the defendants to admit the plaintiff public school pupils to the public schools of the County of Arlington, Virginia, to which they, respectively, have sought admission as set forth in said motion, and for other, additional and alternative relief, it is

ORDERED:

(1) That the said motion be, and it is hereby, set for hearing before this court at 10 o'clock A.M., D.S.T. on the 11th day of September, 1957;

(2) That at said hearing the movants offer their evidence in support of the said motion and produce such other evidence as may then be required of them by the court;

(3) That the defendants personally appear at said hearing in answer to the said motion, offer such evidence as they may deem pertinent, bring with them for examination as witnesses, if called, the principals of the said schools to which the plaintiff pupils have made application for admis-

sion, as aforesaid, as well as any other employees of the defendants having the duty of admitting pupils into said schools, and produce such other evidence as may be required of them by the court at said hearing; and

(4) That a copy of this order be forthwith served by the Marshal upon the defendants and copies thereof be immediately mailed by the Clerk to counsel of record for the defendants.

(s) Albert V. Bryan
United States District Judge

September 9th, 1957.

VIII.

COURT'S ORDER ON MOTION TO INTERVENE
(Entered September 9, 1957)

Upon consideration of the motion of Harolyn Johnson and Rita Johnson, by Harold Johnson, their father and next friend; Robert A. Eldridge, III., by Robert A. Eldridge, Jr., his father and next friend; George Tyrone Nelson, by George M. Nelson, his father and next friend; Harold Johnson; Robert A. Eldridge, Jr.; and of George M. Nelson to intervene as parties plaintiff in this action and to file their complaint in this action in intervention, it is

ORDERED that said motion be, and it is hereby, granted, and the persons just named are hereby admitted as parties plaintiff in this action, and their complaint in intervention, being now tendered, is filed in this action.

Let a copy of this order be forthwith served by the Mar-

shal upon the defendants and copies thereof be immediately mailed by the Clerk to counsel of record for the defendants.

(s) Albert V. Bryan
United States District Judge

September 9, 1957.

IX.

DEFENDANTS' MOTION TO DISMISS THE MOTION FOR FURTHER RELIEF

Now come the defendants, County School Board of Arlington County, Virginia, and T. Edward Rutter, Division Superintendent of Schools, Arlington County, Virginia, and move the Court to dismiss the motion for further relief heretofore filed by the plaintiffs on September 9, 1957, on the following grounds:

1. These defendants are now without power or authority to make assignments to the public schools of Arlington County, Virginia, in that by Chapter 70 of the Acts of Assembly, Extra Session 1956, effective December 29, 1956, they were divested of all power to determine the school to which any child should be admitted; and pursuant to said Act all power of enrollment or placement of pupils is now vested in a Pupil Placement Board.

2. The plaintiffs have not availed themselves of the administrative procedure set forth in said Chapter 70 of the Acts of Assembly, Extra Session 1956, and have not applied for admission to any particular school in the manner required by said Chapter.

3. The said motion for further relief does not allege any facts upon which the relief sought may be granted in that said motion does not allege that the plaintiffs have been denied admission to any school on account of race or color; nor does said motion allege any facts which would entitle any of the plaintiffs admission to the particular schools to which they applied and were denied admission.

4. This Court should not now pass upon the constitutionality of the said Chapter 70 in that the question of the constitutionality of Chapter 70 is now pending before the Supreme Court of Appeals of Virginia.

5. The plaintiffs have not conformed to the procedure set forth in the opinion of this Court dated July 27, 1957, in that the said motion for further relief does not present issues of the individual cases of each plaintiff which must be appraised in its own peculiar environment.

Of Counsel for the County School Board of Arlington County, Virginia, and T. Edward Rutter, Division Superintendent of Schools, Arlington County, Virginia

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Counsel for Defendants

X.

DEFENDANTS' MOTION TO CONTINUE HEARING ON PLAINTIFFS' MOTION FOR FURTHER RELIEF

(Filed September 11, 1957)

Now come the defendants, County School Board of Arlington County, Virginia, and T. Edward Rutter, Division Superintendent of Schools, Arlington County, Virginia, and move the Court to continue the hearing on the motion for further relief filed by the plaintiffs herein on September 9, 1957, which is now set for hearing on September 11, 1957, for the following reasons:

1. The motion was filed without prior service of copies upon counsel for the defendants and without notice to said counsel.

2. The time of the hearing was set without notice to counsel for the defendants.

3. The notice of the hearing was served less than five days before the date specified for the hearing, contrary to Rule 6(d) of the Federal Rules of Civil Procedure; and also in violation of Rule 13 of this Court.

4. The defendants have not had adequate time for preparation of said hearing.

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Counsel for Defendants

XI.

DEFENDANTS' MOTION TO VACATE ORDER ON MOTION TO INTERVENE

(Filed September 11, 1957)

Now come the defendants, County School Board of Arlington County, Virginia, and T. Edward Rutter, Division

Superintendent of Schools, Arlington County, Virginia, and move the Court to vacate its order entered herein on the 9th day of September, 1957, entitled "Order on Motion to Intervene" on the ground that said order was prematurely and improvidently awarded.

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Counsel for Defendants

XII.

THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Dated September 14, 1957)

Seven negro children of school age were refused admission as pupils in the public schools of Arlington County, Virginia on the opening day of the current session. The ground of the refusal was that the applicants had not complied with, or obeyed, the provisions of the Pupil Placement Act of Virginia, 1956 Acts, Extra Session, c. 70. That statute requires every child before entering a public school for the first time, or on graduation from one school to another, to apply to the Pupil Placement Board for enrollment. In refusing the admission, the school principals were following the directions of the defendant County School Board and Superintendent who, in turn, were following the Act. These children, now called the plaintiffs, assert that the refusal violates the injunction previously entered by this court restraining the defendants from denying enrollment in any public school of the County, on account of race or color, to any otherwise qualified child. The plaintiffs move for a supplemental decree directing the admission of these children to the schools. The court will grant the motion.

I. In its injunctive decree the court took notice of existing and future State and local rules and administrative remedies for the assignment of children to public schools. It directed conformance with them before the complainant should turn to the court. Of course, the decree only contemplated reasonable regulations and remedies. Defendants' position that the Pupil Placement Act is such a regulation or remedy is untenable. The procedure there pre-

scribed is too sluggish and prolix to constitute a reasonable remedial process. On this point we also rely upon the reasoning of the Court of Appeals for this Circuit in School Board of the City of Newport News et al. v. Atkins et al., July 13, 1957.

It must be remembered that we are viewing the Act in a different frame from the setting in which it was tested by the Court of Appeals. The Act was then appraised as an administrative remedy which had to be observed before the persons aggrieved could seek a decree of judicial relief. Now the Act is measured against the enforcement of a decree already granted. It is, too, a decree which was passed before the adoption of the Placement Act and bears the approval of the final courts of appeal. For these reasons decision here need not await the outcome of the pending effort to obtain a review of the Court of Appeals' judgment.

This court had hoped that the initial step provided in the Placement Act might be isolated and utilized as a fair and practicable administrative remedy. It thought that a requirement that a pupil first entering a school, or transferring from one school to another, should seek placement from some official or board, would not only be a reasonable, but a necessary regulation as well, in the administration of the school. This agency, it seemed, might validly be a State agency exclusively—such as the Placement Board.

However, the court finds that it cannot fairly require the plaintiffs even to submit their applications to the Board for school-assignment. The reason is that the form prescribed therefor commits the applicant to accept a school "which the Board deems most appropriate in accordance with the provisions" of the Pupil Placement Act. Submission to that Act amounts almost to assent to a racially segregated school. But even if the form be signed "under protest", the

petitioner would not have an unfettered and free tribunal to act on his request. The Board still deliberates, on a racial question, under threat of loss of State money to the applicant's school if children of different races are taught there.

II. The court must overrule the claim of the County School Board and Superintendent that they should not be held to answer for the denial of admittance to the plaintiffs. In this they urge that the Placement Board had sole control of admissions—that the School Board and Superintendent had been divested by the Act of every power in this respect. As just explained, the Placement Act and the assignment powers of the Placement Board are not acceptable as regulations or remedies suspending direct obedience of the injunction. In law the defendants are charged with notice of these infirmities in the Board's authority. Actually the plaintiffs were denied admission by the defendants' agents—the school principals—while the defendants had the custody and administration of the schools in question.

Hence, the refusal by the defendants, immediately or through their agents, to admit the applicants cannot here be justified by reliance upon the Placement Board. The defendants were impotable, also, with knowledge that the injunction was binding on the Placement Board. The latter was the successor to a part of the School Board's prior duties; as a successor in office to the School Board, the Placement Board is one of those specifically restrained by the injunction.

III. We look, then, to see if race or color was the basis for the denial by the defendants and their agents of admission of the applicants to the named schools. It is immaterial that the defendants may not have intended to deny admission

on account of race or color. The inquiry is purely objective. The result, not the intendment, of their acts is determinative.

In this inquiry we have no administrative decision with which to commence, save in one instance. Consequently, the court must examine the evidence in regard to each applicant and ascertain whether it indicates that the denial of admittance was there due solely to race or color. The court is not undertaking the task of assigning pupils to the schools. That is the function of the school authorities and the court has no inclination to assume that responsibility. Carson v. Warlick, 1956, 4 cir., 238 F. 2d 724, 728. But it is the obligation of the court to determine whether the rejection of any of the plaintiffs was solely for his race or color. In this light only does the court now review the evidence.

IV. Arlington is a small county in size, but thickly populated and having the appearance of a city. It has 22,677 (about) pupils in its public schools. Of those 1432 are negroes—946 in the elementary schools, 311 in the junior high school (7th, 8th and 9th grades) and 175 in the senior high school (10th, 11th and 12th grades).

All together there are 40 school buildings in the County. These include 4 schools for negroes — one high school, Hoffman-Boston (combining junior and senior) located in the extreme southern end of the County and embracing an elementary school with it; and 2 other elementary schools, Drew-Kemper near the Hoffman-Boston, and Langston in the district to be mentioned in a moment as the northern Hoffman-Boston.

There are 2 high schools for the white children, Washington and Lee in and to serve the northern half, and Wakefield in and for the south half, of Arlington; there are 6 junior high schools, Stratford and Swanson among them, scattered throughout the County for the white children; and

there are 28 elementary "white" schools, including Fillmore and Patrick Henry.

Each school and its contiguous territory form a school district. The boundaries of a district are drawn to include the school population in the vicinity of the school as far as the facilities of the school will allow. Before the creation of the Placement Board the pupils assignable to each school were, if otherwise eligible, limited to those who resided in the school district. These lines have never been altered by the School Board, but the defendants point out that the Placement Board may or may not follow these bounds. Apparently it has done so.

Nothing in the evidence indicates that any of the plaintiffs is not qualified in his studies to enter the school which he sought to enter. Each applicant applied to a "white" school, but each lives in the district of that school or of another nearby "white" school. Nor did the evidence reveal a lack of space for him, or that the school did not afford the courses suited to the applicant. Counsel for the defendants explained that they did not adduce evidence as to the eligibility of the applicants for their respective schools because this was a matter within the purview of the Placement Board. Anyway, no intimation of disqualification appeared as to any applicant.

A review of the evidence is convincing that the only ground, aside from the provisions of the Placement Act, for the rejection of the plaintiffs was that they were of the negro race. The rejection was simply the adherence to the prior practice of segregation. No other hypothesis can be sustained in any of the seven instances. The evidence as to the plaintiffs shows as follows:

(1) Rita and Harolyn Johnson, 15 and 16 years old, personally presented themselves for admission to the Wash-

ington and Lee High School on the opening day, September 5, 1957. They desired to enter the 10th and 12th grades, respectively, and carried with them documentary evidence of their academic proficiency, having attended schools in the District of Columbia during the last school session. Their residence is 2901 North Lexington Street, in the northern extremity of the County. It was within the Washington and Lee School District and a distance of approximately 2 miles (air line) from the school. The two other senior County high schools were twice that distance from the Johnson's.

They were refused admission because they had not executed the Board's placement forms. Their father declining to allow them to complete the forms, they are now attending school in the District of Columbia.

(2) Robert A. Eldridge, aged 9, wished to enter the 4th grade. As a new arrival in the County, his father had made application on August 15, 1957, for the enrollment of Robert in Fillmore, an elementary school. He procured a placement form but did not file it. On the opening of school Robert was refused admission into Fillmore for lack of the form.

This boy lives at First and Fillmore Streets, a distance of slightly more than one city block from the Fillmore School, but is within the School District of Patrick Henry, an elementary school six city blocks away. A white child living there would normally enter either Patrick Henry or Fillmore. The nearest school used by colored children was 1.25 miles away.

(3) Leslie Hamm had completed the elementary courses at the County's Langston School, and wanted to enter Stratford Junior High School. He was refused admission

on the opening day of school at Stratford because he had not been assigned by the Placement Board, never having made application.

He resides at 1900 North Cameron Street. This address is within what we describe as the northern Hoffman-Boston District. This district, however, is 3.5 miles from the Hoffman-Boston School and from the area around that school also designated as a Hoffman-Boston District. The northern Hoffman-Boston District is set apart apparently because the area is occupied predominantly by negroes. However, a white child living in the northern District would be eligible to attend either the Swanson or Stratford Junior High School. Swanson is something more than a mile from the Hamm residence, Stratford slightly less than a mile.

(4) Louis George Turner and Melvin H. Turner, having respectively finished the 7th and 8th grades in one of the colored schools in the County, sought admission to the Swanson Junior High School on August 22, as well as on the opening day. Not having filled out the placement form, they were both refused admission. They live at the intersection of 22nd Street, North, and George Mason Drive. This is within the northern District of Hoffman-Boston. A white child in this section would ordinarily go either to Swanson or Williamsburg Junior High School. Swanson is less than a mile distant, while Williamsburg is about 1.25 miles away.

(5) George T. Nelson filled out a placement form and filed it on August 19 or 26 with the principal of Stratford Junior High School. On this application, the Pupil Placement Board assigned him to Hoffman-Boston School. On the opening day of school he was refused admission at Stratford.

Nelson lives at 2005 North Cameron Street. This is within the northern Hoffman-Boston District. Hoffman-Boston School is 6 miles from his home, while Straftford is ½ mile away. Swanson Junior High School is a little further away. The basis for the Board's placement is not given; no reason is evident for ignoring Stratford or Swanson. It cannot be accepted, for it is utterly without evidence to support it.

V. The defendants and their agents, in barring the admission of the complainants, did not intend any defiance of the injunction. The bona fides of their assurance to the court—that they believed they should not admit the applicants without an assignment by the Placement Board—cannot be doubted. However, the defendants and their agents must now understand that the injunction is paramount in the present circumstances and that they can no longer refuse admittance to the plaintiffs.

The injunction will affect the school attendance very slightly. Into a white school-population of 21,245, only 7 negro children will enter; 1 negro will be with 11,421 white children in the elementary grades; and no more than 6 negroes among the 9,824 white high school students. Of 36 previously "all-white" schools in the County, 4 will be affected by the decree, and then not to a greater extent than 2 negroes in any one of the 4 schools.

The supplemental decree will be effective at the opening of the schools Monday morning, September 23, 1957.

(s) Albert V. Bryan
United States District Judge

September 14, 1957.

XIII.

THE COURT'S SUPPLEMENTAL DECREE OF INJUNCTION

(Entered September 14, 1957)

Upon consideration of the motion by and on behalf of Harolyn Johnson, Rita Johnson, Robert A. Eldridge III, George Tyrone Nelson, E. Leslie Hamm, Jr., Louis George Turner and Melvin H. Turner that the court enter a further decree specifically directing the defendants to admit them to the schools to which they have applied for admission for the session of 1957-58, and upon consideration of the evidence and arguments of counsel for all the parties on said motion, the court is of the opinion, on the findings of fact and conclusions of law this day filed, that said motion should be granted, and, therefore, it is

ORDERED that the defendants, their successors in office, agents, representatives, servants, and employees be, and each of them is hereby, restrained and enjoined from refusing to admit the said movants to, or enroll and educate them in, the said schools to which they have made application for admission, that is:

1. Harolyn Johnson in the Washington and Lee High School;

2. Rita Johnson in the Washington and Lee High School;

3. Robert A. Eldridge III in the Fillmore School or the Patrick Henry School;

4. George Tyrone Nelson in the Stratford Junior High School or the Swanson Junior High School;

5. E. Leslie Hamm, Jr. in the Stratford Junior High School or the Swanson Junior High School;

6. Louis George Turner in the Swanson Junior High School; and

7. Melvin H. Turner in the Swanson Junior High School;

upon the presentation by the said movants of themselves for admission, enrollment and education in the said schools commencing at the opening of said schools on the morning of September 23, 1957.

Let copies of this order be forthwith sent to counsel in this cause.

(s) Albert V. Bryan
United States District Judge

September 14, 1957.

XIV.

DEFENDANTS' NOTICE OF APPEAL

(Filed September 16, 1957)

NOTICE IS HEREBY GIVEN that the County School Board of Arlington County, Virginia and T. Edward Rutter, Division Superintendent of Schools, Arlington County, Virginia, defendants named above, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the following:

1. Supplemental Decree of September 14, 1957, enlarging the injunction heretofore granted.

2. Order entered September 11, 1957 denying the defendants' motion to continue the hearing on the plaintiffs' motion for further relief.

3. Order entered September 11, 1957 denying motion of defendants to vacate order of intervention theretofore entered by the Court on September 9, 1957.

4. Order entered September 11, 1957 denying the defendants' motion to dissolve the injunction theretofore awarded.

(s) Frank L. Ball
Frank L. Ball
1437 North Court House Road
Arlington, Virginia

(s) James H. Simmonds
James H. Simmonds
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XV.

EXCERPTS FROM REPORTER'S TRANSCRIPT

A.

Testimony of Harold M. Johnson

DIRECT EXAMINATION

[TR. PP. 8-9]

By Mr. Brown:

Q Dr. Johnson, did there come a time when you presented your children for admission to the schools in Arlington?

A Yes, there did.

Q And when was it?

A That was last Thursday, the opening day of the schools in Arlington County.

Q Now did you present both your daughters to the same school?

A I did; yes.

Q And what school was that?

A That was at Washington and Lee High School.

Q And were they admitted to the school?

A No, they were not.

Q Was any reason given at that time as to why they were not admitted?

A The person with whom I talked said that since they were new to the Washington and Lee School that I would have to sign pupil placement forms and that I might sign them then or I might take them home and either bring them back to the school, to that particular school, or I might take them to a Board that had been set up in Arlington County in the Radio Building. I don't have the exact address.

THE COURT: That is the Pupil Placement Board which had been set up?

THE WITNESS: In Arlington County, I could take it to either of those two places, either back to Washington and Lee High School, or to a Pupil Placement Board in Arlington County.

BY MR. BROWN:

Q Were you given pupil placement forms for each of your children?

A Yes, I was.

Q Did you execute those forms?

A No, I did not.

* * *

CROSS-EXAMINATION

[TR. PP. 14-15]

BY MR. BALL:

Q Do I understand you to say that admission was denied?

A They told me that my children could not go to school at Washington and Lee until I had filled ou .ie pupil placement forms.

* * *

[TR. PP. 16-18]

BY MR. BALL:

Q Did he say anything to you about race?

A No, sir; he did not.

Q Did you say anything to him about race?

A No, I did not.

Q Didn't he tell you that he had no authority to register anybody there but the placement had to be made by State Board?

A I don't recall his saying he had no authority, but those particular words, but he did tell me that I would have to fill out the pupil placement form in order to be, in order for my daughters to be admitted.

Q He told you no one could be admitted to that school without having permit from the Placement Board?

A He didn't tell me no one. I don't believe that, but I am trying to recall what he said. I don't recall those particular words.

Q Did he say anything at all to indicate that he was treating you any differently from what he would a white person who was applying?

A No, he didn't.

Q Nothing whatever.

I understood you to say he told you that the Placement Board had an office in Arlington?

A Yes, that is right.

Q He gave you that address?

A He did. I wrote it down.

Q Did he give you the forms?

A Yes.

Q And what did you tell him when he handed you the forms?

A I told him that I was going to take the forms home and talk it over with my wife and then we would decide what to do.

Q And you decided to ignore the provisions of the Virginia law completely, didn't you, and not sign any forms?

A Well, if that is the Virginia law; yes, I did decide that.

Q And did you go back and tell the Principal that?

A No.

Q Did you go back to school at all?

A I did not.

Q The only time you have been there then was when you went and they told you to get your form, your placement from the Placement Board, and you told them you'd think that over and that was all, you never went back any more?

A That's right.

Q Not communicated with the school at all?

A No.

* * *

B.

Testimony of Robert A. Eldridge

DIRECT EXAMINATION

[TR. PP. 22-23]

BY MR. BROWN:

Q And do you have children of school age, Mr. Eldridge?

A I have a son, Robert A. Eldridge, who is nine years old, sir.

Q And did there come a time when you presented him for admission to the school in Arlington County, Virginia?

A Yes, sir.

Q And to what school did you present your child?

A Being a new person moving into the Arlington area, I read in the papers that you should take your children to a

school on August 15th, so I took my boy to the Patrick Henry School about 1:50 p. m. on that date. I spoke to a lady there and I told her that I just moved into the area and I'd like to register my boy in order that he might attend the fall term, elementary school.

Q What were you told at the time that you presented your child for registration?

A The lady, Miss Vance, I believe, should be the name —she told me that I would have to fill out a pupil placement form and I left the school at that particular time without the placement form, and told her I would think about it. I decided later, about an hour later, to go back to the school and about 2:30 p. m. the same day I did pick up a pupil placement form with the — I explained to Miss Vance that I would speak to my wife and we would talk, we'd confer about it and decide whether we should turn it in or not.

Q And you obtained the pupil placement form from Miss Vance?

A Yes, that is her correct —

Q I show you document here and ask you if you can identify it?

A I can identify it by my signature and the date that I put on the bottom.

Q Is that the form that was given you by Miss Vance?

A That's correct.

Q And did you, or did you not execute that form?

A I did not, sir.

• • •

[tr. tr. 26-27]

Q Tell me this, Mr. Eldridge, did anyone at any of those schools that you went to making admission inquire

as to whether or not you had your child's birth certificate or if you had your child's previous records or any other prerequisites for filing your admission?

Did anyone ask you anything?

A No, they did not, Mr. Brown. The question was they were the people who talked to me were very specific in stating that they couldn't do anything for me unless I filled out the placement form and I was very specific to ask if that was the situation and I was told that that was definitely the situation.

Q In other words, they didn't inquire about anything else other than your executing the pupil placement form?

A That was the only inquiry made.

* * *

CROSS-EXAMINATION

[TR. P. 35]

BY MR. BALL:

Q Did anybody tell you your child couldn't get into the Arlington School System?

A Not in that exact—not in exact way you say it.

Q Did anybody mention race to you, anybody connected with the schools at any time?

A Did not mention race to me.

* * *

[TR. P. 37]

Q Now you got your forms from the Patrick Henry School?

A That is correct, on the fifteenth of August.

Q And did you read the form over there at the school?

A Yes, and as I said, I read it partially.

Q But you didn't make up your mind there?

A That is correct, at that particular time.

Q You talked to your wife afterwards?

A Yes, I—I decided that I had better go back. I didn't take the form at 1:50 when I was there on the date, so after going back home I decided that I should take the form in the event that I did decide to sign it.

Q Yes.

A So I went back and got the form and after talking with my wife we decided that we would not sign it.

* * *

C.

Testimony of Dorothy P. Nelson

CROSS-EXAMINATION

[TR. P. 67]

BY MR. BALL:

Q You talked with Mr. Richmond; no statement made about race at all, was it?

A No, sir; no question.

* * *

[TR. PP. 72-73]

Q Did you claim that your written application asked for admission to Stratford, your written application mention Stratford at all?

A I don't understand you clearly.

Q You filled in a form, didn't you—let me—is that the form you filled in? Is that your handwriting on there? Look at it carefully. Take a second.

A This is my handwriting right here.

Q That is the form, isn't it, you filled in?

A Yes, it is.

Q Is Stratford mentioned there anywhere in that form, or in your writing, or anybody's writing anywhere?

A I don't see it.

Q Is not, is it?

A No, it is not.

Q You claim that you filled in any other form except that one?

A That is all the form.

Q That is the only one. So you didn't ask for a transfer to Stratford because you didn't even mention Stratford; is that right? Isn't it?

A I didn't ask for a transfer. That is the only form we had.

* * *

D.

Testimony of Arthur M. Costley, Sr.

DIRECT EXAMINATION

[TR. PP. 77-78]

BY MR. HILL:

Q What school was it? What happened?

A My wife took them up to Swanson Junior High and they gave her a placement form to fill out. In fact, they filled out the form and actually gave it to her and told her she would have to sign that in order for the child to be placed in any school or transfer. My wife took the children to the school and she was given a placement form.

Q Speak a little louder. Remember the Judge has got to hear you.

A She was given a placement form and this form was filled out at the school, and they told her that if she wanted

the kids to get in school or transfer they'd have to, she'd have to sign this form, so she told them that she'd take it home and talk with me about it. She brought it home and we decided that we wouldn't sign it.

Q Did you look at the form carefully?

A I didn't, no. I didn't look at it too carefully because I read such about the placement form being unconstitutional and all, and I just decided I didn't want to sign it.

* * *

[TR. PP. 81-82]

Q Now after this series of correspondence concerning your child, what did you do, Mr. Costley?

A Well, we consulted the map, and we decided that the Swanson School was nearer us, to the boundary line of Swanson School.

Q Talk louder so the Judge can hear you.

A Than any other school, so I thought I would take my kids there to the Swanson. I went up to Swanson that morning, opening of school, and I was shown to the Principal's office. The Principal acknowledged that my wife had been there before, and, consequently, she knew the boys and I told her that I'd like to enter my boys in school, so she said that the procedure of the Placement Board was that you had to fill out the form and sign it, and if I didn't want to sign the form, I told her I hadn't signed it—and she said, "Well, then if you want to get your children in school in Virginia," that you would have to send them back to the school that they originally came from.

Q You would have to go back to the school?

A Back to the school which they attended.

Q Originally came from.

And was there anything further said on that date?

A No, there was nothing further said.

Q Were your children admitted?

A No, they weren't admitted to Swanson. I took them back to Hoffman-Boston.

* * *

CROSS-EXAMINATION

[TR. P. 89]

BY MR. BALL:

Q And they told you at the school where you went that you, that the Placement Board had control of that situation, didn't they, have to make application to them?

A Yes.

Q And you never wrote to the Placement Board asking for transfer, did you?

A No, I didn't.

Q Didn't fill in one of their forms, didn't write a letter, didn't do anything so far as the Placement Board is concerned?

A No.

* * *

E.

Testimony of Dorothy M. Hamm

DIRECT EXAMINATION

[TR. P. 95]

BY MR. BROWN:

A. On the twenty-third of August my husband and I were by [illegible] to make application for admission and we were told that the only manner of application was the pupil placement form.

Q Who was it that told you that, if you know?

A Mr. Richmond, Principal.

* * *

CROSS-EXAMINATION

[TR. P. 101]

BY MR. BALL:

Q He never mentioned race at all to you?

A No, he did not.

Q And you never mentioned to him?

A No, I didn't.

Q So that was not discussed in any way?

A No.

Q The only thing that he told you that the placement form would have to filled out before he could enter any school in August?

A That's right. Those were the instructions he had.

Q Did you ever fill that form in?

A No, I did not. I also received one in June. My son brought one home in June, and I did not fill that one in and neither did I fill the other one in.

XVI.

RULINGS OF THE COURT

[TR. PP. 4-5]

THE COURT: Gentlemen, I think the motion to vacate the order of intervention should be denied. The intervention was allowed heretofore because intervention of this sort by a person similarly situated was generally allowed. The

order permitting the intervention, of course, is always subject thereafter to attack just as it has been attacked today. But the immediate entry of the order did harm to no one. The Court is also of the opinion that the motion to continue should be denied. At the time the order was presented to the Court to set this motion for hearing, it was of the opinion either that the motions had been served, or what would amount practically to the same thing, that they would be immediately served. Counsel for the plaintiff explained that he had not inserted in the certificate the date of the hearing of the motion because he did not know it, and I am sure that counsel was of the same opinion as the Court was, that the subsequent delivery of the motion the same day practically would have the effect of antecedent delivery of it. The Court was well aware of the five days' rule and practice but fixed a shorter time in view of the known urgency of the situation; fixed it too, having in mind that if there was any serious objection to the time fixed, it could be changed on the motion. It is always difficult in fixing time for hearing in a case where there are so many counsel. Frequently the Court has to fix a date arbitrarily and then wait for objections. It has also to bear in mind the circumstances of the case, the circumstances of counsel, and circumstances of its own docket. Where the Court believes that no injury will be done by proceeding with the case, but should any develop, why, the Court can [illegible]

The motion to dismiss [illegible] is likewise denied. That goes to the very merits of the case which would be developed on hearing of the principal motion in the case.

I think that takes care of the preliminary motions. The Court is now ready to proceed with the principal motion.

TABLE OF CONTENTS

	Page
Opinions of Courts Below	1
Statement of Jurisdiction	2
The Questions Presented	2
The Statute Involved	3
Statement of the Case	3
The Reasons for the Allowance of the Writ	6
Argument in Support of the Writ	7
1. The Necessity for a Three-Judge Court	7
2. A Class Action May Not Be Brought to Enforce the Rights of These Respondents	11
3. A Federal Court Should Not Exercise the Functions of a Local School Board	15
4. The Decision of the Supreme Court of Appeals of Virginia in the DeFebio Case	17

Appendix:

I. Opinion of the Circuit Court of Appeals for the Fourth Circuit	App. 1
II. Memorandum of the District Court	App. 2
III. Order of the District Court	App. 10
IV. Virginia Pupil Placement Act	App. 11
V. Opinion of the Supreme Court of Appeals of Virginia in the DeFebio Case	App. 17

TABLE OF CITATIONS

Cases

	Page
Cleveland v. United States, 323 U. S. 329	8
DeFebio v. County School Board of Fairfax County, 199 Va. 511	3, 7, 9, 18
Doud v. Hodge, 350 U. S. 485	8
Ex Parte Bransford, 310 U. S. 354	11
Ex Parte Collins, 277 U. S. 565	7
Phillips v. United States, 312 U. S. 246	8
Rorick v. Everglades Drainage District, 307 U. S. 208	6, 7
School Board of Newport News, Va. v. Atkins, 246 F. (2d) 325	10

Other Authorities

Federal Rules of Civil Procedure:	
Rule 12(a)	12
Rule 12(b)(6)	12
Rule 21	4
Rule 23	3, 6, 11, 13, 14
U. S. Code, Title 28:	
Section 1254	2
Section 1343	4
Section 2281	6, 7, 8, 11
Virginia Pupil Placement Act	3, 6

In the

Supreme Court of the United States

October Term, 1957

No. .....

COUNTY SCHOOL BOARD OF ARLINGTON COUNTY, VIRGINIA AND T. EDWARD RUTTER, DIVISION SUPERINTENDENT OF SCHOOLS OF THE COUNTY OF ARLINGTON, VIRGINIA,
Petitioners

v.

CLARISSA S. THOMPSON, ET AL.,
Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, the County School Board of Arlington County, Virginia, and T. Edward Rutter, Division Superintendent of Schools of the County of Arlington, Virginia, respectfully pray that a writ of *certiorari* be issued out of and under the seal of the Court to review the decision of the United States Court of Appeals for the Fourth Circuit hereinafter set forth and represent as follows:

I.

OPINIONS OF COURTS BELOW

The opinion of the Court of Appeals was rendered on

February 12, 1958, and is printed as Appendix I to this petition. It has not yet been reported.

The "Findings of Fact and Conclusions of Law" of the District Court for the Eastern District of Virginia, Alexandria Division was rendered on September 14, 1957, and is printed as Appendix II. It is not reported.

II.

STATEMENT OF JURISDICTION

The final decree of the district court was entered on September 14, 1957, a copy of which is found as Appendix III.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (June 25, 1948, C. 646, 62 Stat. 928).

III.

THE QUESTIONS PRESENTED

Point 1

Does a federal district court have jurisdiction to enter a decree of injunction which has the effect of enjoining the enforcement of a state statute without first convening a three-judge court?

Point 2

Do the Federal Rules of Civil Procedure permit a continued prosecution of a "class-action" suit for the sole purpose of enforcing alleged claims of individuals when there is no common question of fact, and when no common relief is sought?

Point 3

May a federal district court exercise the function of a local school board before such local school board has been given an opportunity to exercise its judgment in making pupil assignments?

Point 4

Is the decision of the court below in conflict with the decision of the Supreme Court of Appeals of Virginia in the case of *DeFebio* v. *County School Board of Fairfax County*, a copy of which is printed as Appendix V of this petition?

IV.

THE STATUTE INVOLVED

Chapter 70 of the Acts of the General Assembly of Virginia, Extra Session, 1956, is generally referred to as the Virginia Pupil Placement Act. Local school boards and division superintendents of schools are divested of all authority to assign pupils to the public schools, such authority being vested in a Pupil Placement Board appointed by the Governor.

In accordance with Rule 23(d) of this Court, the Act is printed as Appendix IV to this petition and also may be found as Sections 22-232.1 to 22-232.16, inclusive, of the Code of Virginia, 1956, Additional Supplement, pp. 61-64.

V.

STATEMENT OF THE CASE

By order dated July 31, 1956, the district court enjoined the petitioners from refusing on account of race or color

to admit any child to a school under their control. That order was affirmed by the circuit court and certiorari was denied by this Court. 240 F. (2d) 59 (1956); cert. den. 353 U. S. 911 (1957). The jurisdiction of the district court was invoked under Title 28, U. S. Code, Section 1343.

In July, 1957, three of the respondents in this case filed a Motion to modify the aforesaid order for the purpose of making the injunction effective at the commencement of the school session in September, 1957, and for the further purpose of having the district court declare that they did not have to comply with the Virginia Pupil Placement Act. The district court refused at that time to pass judgment on the Act. (See Appendix I, II and III of "Brief and Appendix on Behalf of Appellants" which is made a part of the record in this case under Rule 21 of this Court.)

Thereafter, on September 9, 1957, three of the respondents filed their Motion for Further Relief asking for a decree directing the petitioners to admit them to the schools in which they allegedly had sought admission. On the same date, four Negro children filed a Motion to Intervene and their Complaint in Intervention, seeking the same relief as prayed for in the Motion for Further Relief. Without notice to the petitioners, orders were entered the same day granting the intervention and setting September 11, 1957, as the date to hear the Motion for Further Relief on its merits. (See Appendix V, VI, VII and VIII of "Brief and Appendix on Behalf of Appellants".)

On the said September 11th, the petitioners filed the following motions:

1. Motion to Continue Hearing on Plaintiffs' Motion for Further Relief.

2. Motion to Vacate Order on Motion to Intervene.
3. Motion to Dissolve the Injunction.
4. Motion to Dismiss the Motion for Further Relief.

After oral argument, the district court denied the first three motion set forth above but did not, and as yet has not, passed on the Motion to Dismiss the Motion for Further Relief. Instead, the court immediately proceeded to hear evidence on the Motion for Further Relief.

On September 14, 1957, the district court entered its decree directing that the seven respondents be admitted to the schools of their choice. The circuit court affirmed the decree by its *per curiam* opinion of February 12, 1958.

Of the seven respondents involved, three were attempting to enter the Arlington public school system for the first time when their parents presented them for enrollment on the opening day of school in September, 1957. They refused to sign and file pupil placement forms with either the local school authorities or the Pupil Placement Board which had a branch office in Arlington County.

The remaining respondents not only refused to sign and file pupil placement forms with the proper authorities, but also refused to make application for transfers out of the schools to which they had been previously assigned.

The only reason given by the respondents for desiring to enter a particular school was that it was the nearest school to their homes. No mention of race was made at any time and no reason other than failure to sign a pupil placement form was given by the school officials for refusing to admit the respondents to the schools of their choice.

VI.

THE REASONS FOR THE ALLOWANCE OF THE WRIT

The petitioners respectfully submit:

1. A serious jurisdictional question is raised in this case. As pointed out, the Virginia Pupil Placement Act divested the petitioners "of all authority now or at any future time to determine the school to which any child shall be admitted". (Section 1, Chapter 70, Acts of the General Assembly of Virginia, Extra Session, 1956; Section 22-232.1 of the Code of Virginia, 1956, Additional Supplement.) Yet the district court enjoined the petitioners from refusing to admit the respondents to the schools "to which they have made application for admission * * *." By so doing, the district court has effectively enjoined the operation of a State statute in violation of the provisions of Title 28, Section 2281, U. S. Code. Since the question of whether or not a district court of three judges should have been convened is jurisdictional, it may be raised for the first time in this Court. See *Rorick* v. *Everglades Drainage District*, 307 U. S. 208 (1939).

2. The court below sanctioned the departure from accepted and usual courses of judicial proceedings by the district court to such an extent as to call for an exercise of this Court's power of supervision in that a "class-action" suit was permitted to be used to enforce individual claims of the seven respondents. In the absence of a common question of fact, and when no common relief is sought, class actions are not permitted. Rule 23 of the Federal Rules of Civil Procedure.

3. The circuit court, by affirming the decree of the district court, has decided an important question of federal law

which has not been but should be settled by this Court. The question arises as a result of this Court's decisions in the school segregation cases (347 U. S. 483 (1954) and 349 U. S. 294 (1955)). It is whether a federal court should exercise the functions of a local school board.

4. An important question of local law has been decided by the courts below in such a way as to be in conflict with the case of *DeFebio* v. *County School Board*, 199 Va. 511 (1957); Advance Sheets No. 5 at p. 511. There, the Supreme Court of Appeals of Virginia held that the General Assembly had the power to vest in an authority, other than a local school board, the control over the placement of pupils in the public schools of the State.

VII.

ARGUMENT IN SUPPORT OF THE WRIT

Point 1

The Necessity for a Three-Judge Court

A district court of a single judge has no jurisdiction to hear and determine an application for an injunction which seeks to restrain a State officer from enforcing a State statute upon the ground that such statute is unconstitutional. 28 U. S. C. Section 2281. Further, the necessity for a three-judge court, being jurisdictional, may be raised for the first time in this Court. *Rorick* v. *Everglade Drainage District*, *supra*, at p. 209.

There can be no doubt that the Virginia Pupil Placement Act is a state law of state-wide concern and of general application. Compare *Ex Parte Collins*, 277 U. S. 565 (1928). It is equally clear that the members of the school board and

the division superintendents of schools, or their successors in office, the members of the Pupil Placement Board, are such state officers as contemplated by the language of Section 2281. See *Cleveland* v. *United States*, 323 U. S. 329, 332 (1945).

This Court recognized, in the case of *Doud* v. *Hodge*, 350 U. S. 485, 487 (1956), that when a complaint attacks the validity of a State statute under the Fourteenth Amendment, the suit should be tried before a district court of three judges. See also *Phillips* v. *United States*, 312 U. S. 246, 253, wherein the following test was laid down by this Court in discussing the necessity for a three-judge court:

> "* * * In other words, the complaint must seek to forestall the demands of some general state policy, the validity of which be challenges. * * *"

The respondents' Motion for Further Relief and Complaint in Intervention meet the rule enunciated in the above cited cases. Paragraph 2 of the said Motion and paragraph 5 of the said Complaint are identical except for the difference in reference to the movants in the two pleadings. Paragraph 2 reads as follows:

> "2. The Pupil Placement Act is an integral part of a legislative plan to retain segregated public schools in Virginia. It operates conjunctively with Items 133, 134, 137, 138 and 143, Chapter 71, Acts of Assembly, Extra Session 1956, and Sections 22-188.3 to 22-188.15, inclusive, and Sections 22-188.30 to 22-188.40, inclusive, of the Code of Virginia of 1950, to render impossible the elimination of racial segregation in public schools, and to render futile any effort to obtain a nonsegregated public education by pursuing its provisions. In consequence thereof, the Pupil Placement Act

> denies infant plaintiffs their liberty without the due process of law, and the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States, and does not afford an administrative remedy that plaintiffs are legally required to exhaust as a condition precedent to seeking relief in this Court." (Brief and Appendix on Behalf of Appellants, App. 5 and 9.)

Thus, it can be seen that the respondents did attack the constitutionality of a State statute under the Fourteenth Amendment.

Two other questions must now be considered. First, does the injunction issued by the district court restrain the "enforcement, operation or execution" of the Virginia Pupil Placement Act? It clearly does. In the case of *DeFebio* v. *County School Board*, *supra*, at p. 513, the Supreme Court of Appeals of Virginia construed the Act to require, as a prerequisite to admission to the public schools, that an applicant furnish the following information to the Pupil Placement Board:

> "(1) Name, address, date of birth, sex, condition of health, physical or mental disabilities, and particular aptitudes of the child; (2) name and address of school the child last attended, his grade and years in school, and (3) name and location of any school in Virginia in which any other child of applicant is enrolled."

The order of the district court requires the petitioners and the Pupil Placement Board to admit the respondents to the public schools of their choice without first compelling them to comply with the requirements of the Virginia Pupil Placement Act set forth in the preceding paragraph. This unequivocably restrains the "enforcement, operation or execution" of the Act.

Finally, may it be argued that a three-judge court is not necessary by reason of the fact that the decree of the district court does not enjoin the petitioners, or their successors in office, from enforcing the Virginia Pupil Placement Act? We submit that it cannot be so argued.

When the district court's "Findings of Fact and Conclusions of Law" are read, with particular reference to paragraph II thereof, the effect of its decree becomes apparent. (See Brief and Appendix on Behalf of Appellants, App. 20.) The petitioners and their successors in office have been enjoined from enforcing a State statute.

It is interesting to compare the case of *School Board of City of Newport News, Va.* v. *Atkins*, 246 F. (2d) 325 (4th Cir., 1957), cert. den. ..... U. S. ....., 78 S. Ct. 83, 2 L. Ed. (2d) 80 (Oct. 1957). There the decree of the district court did not require the assignments of children to particular schools. The operative language only restrained the local school officials from "refusing, solely on account of race or color, to admit to, or enroll or educate in, any school under their operation, control, direction or supervision, directly or indirectly, any child otherwise qualified for admission to, and enrollment and education in, such school."

Commenting on the necessity for a three-judge court, the circuit court said, at p. 327:

> "It is argued that the court was without jurisdiction of the cases and that only a three-judge court would have had jurisdiction because the constitutional validity of the Pupil Placement Act was involved. This question was not raised, however, in the applications for injunction, which were filed before the passage of that act and which merely sought the protection of constitutional rights in a suit for the hearing of which a court of three judges was not required. * * * As no injunction was asked or granted against the enforcement of

the act or the officials charged with its enforcement, a case for the constitution of a three-judge court was not presented, even though the constitutionality of an act relied on in the motion to dismiss was involved."

The facts of this case, as heretofore set forth, plainly distinguish it from the above quoted case. Here, the respondents attacked the Virginia Pupil Placement Act on the ground that it denied them liberty without due process and the equal protection of the laws secured by the Fourteenth Amendment. The result of the district court's decree is indistinguishable from a decree that might in more specific language prevent the enforcement or the execution of the Act. To hold otherwise would defeat the purpose and intent of Section 2281.

A three-judge court is required when a petition seeks an injunction on the ground of the unconstitutionality of a statute as applied. *Ex Parte Bransford,* 310 U. S. 354 (1940). Therefore, this Court should exercise its power of supervision by granting this writ and holding that the court below was without jurisdiction to affirm the decree of the district court.

Point 2

A Class Action May Not Be Brought to Enforce the Rights of These Respondents

The applicable language of Rule 23 of the Federal Rules of Civil Procedure pertaining to class actions reads as follows:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all

may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

* * *

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Petitioners recognize that this Court has approved the principle that when violations of individual rights are committed on a class basis or as a group policy, such as discrimination generally because of race, such rights are entitled to be the subject of class actions and class adjudications under Rule 23. The respondents had a class adjudication of their rights as evidenced by the district court's order of July 31, 1956. See 240 F. (2d) 59 (1956). Here, they seek personal rights, the exercise of which must necessarily depend upon the facts peculiar to each individual. Under such circumstances, a class suit is not permitted.

Although designated "Plaintiffs' Motion for Further Relief," the pleading was in reality an original complaint by each of the seven colored children (four of whom were strangers prior to September 9 to any litigation affecting their rights to attend school) alleging that they, as particular individuals, had been denied admission to the public schools of Arlington in violation of the Fourteenth Amendment. The fact that the respondents sought to use the original class action as a vehicle is no reason to deny the petitioners due process of procedural law, as embodied in the Federal Rules of Civil Procedure, namely, to have the sufficiency of the complaint tested by a motion to dismiss (Rule 12(b)(6)), to be thereafter allowed ten days to answer the motion and raise issues of fact (Rule 12(a)), and to then try the issues of fact after reasonable time for preparation. On the

contrary, these seven respondents filed their complaint and the trial was concluded thereon in less than three days without any answer thereto having been filed. The Federal Rules of Civil Procedure make no distinction as to the color or race of the litigants. Yet that very effect was obtained in this instance: a so-called class action was brought wherein all Negro school children in Arlington County, present and future (even persons yet unborn) may bring their complaints without twenty days' notice to the petitioners, without having the legal sufficiency of the complaint tested before a trial on the facts, and without having their cases placed on the docket for trial in due course.

This novel and discriminatory result has been achieved by prosecution of a "class-action" suit. It is submitted that no such result was contemplated by Rule 23. The Rule contemplates that where a class is numerous, one or more persons may, on behalf of all, sue "when the character of the right to be enforced for or against the class is * * * (3) several, and there is a common question of law or fact affecting the several rights *and a common relief is sought.*" (Italics supplied.) The respondents recognized and alleged this in their original complaint as justification of the class action. An injunction was obtained for the benefit of the class and this has become final. But now there is no basis for a class action in enforcing the claims of the *individual* or several members of the class because there is no common question of fact relating to all members of the class, or even to the seven individual respondents involved in this appeal; and no common relief is sought. While the question of fact in the case of each of the seven children is: "Was he denied admission because of race or color," there must be an individual determination as to each one. Assume there had been discrimination as to one but not as to the others: this would

not justify the requiring of all seven to be admitted to the schools of their choice; and conversely, the denial of relief as to the six would not justify denial of relief to the seventh. Thus no "common relief" is sought as is required by Rule 23.

The very fact that four of the respondents found it necessary to intervene demonstrates that common relief is not sought. The concept of a class action is that one or a few obtain a judicial determination for the benefit of all in the class.

The individual nature of the specific complaints of the respondents was noted by the District Court in the memorandum accompanying the order of July 27, 1957, when it was said:

> "If and when there are complaints of violations of the decree, the court will then inquire if the complainant has first submitted, or has adequate means of submitting his grievance for correction administratively. At that time it will weigh the complaint and any administrative action taken thereon, to ascertain whether the decree has or has not been followed, and if not, the reason for the failure. Thereupon it will make such further order as is appropriate. In this way specificity and percision will be given to each complaint, it will be individualized, and it will be appraised in its own peculiar environment, of course in the light, too, of the regulations and precedents then at hand." (Brief and Appendix on Behalf of Appellants, App. 3.)

The individual complaints here involved are foreign to the principle of a class action. Being complaints of denial of constitutional rights, based on the peculiar facts relating to each individual respondent, such complaints should follow the procedure required in individual civil suits, and the petitioners are entitled to such procedure.

Point 3

A Federal Court Should Not Exercise the Functions of a Local School Board

The Arlington County school system, both elementary and high, is divided into school districts. Children are not assigned to the school nearest their residence, but are only assigned to the school in the district of their residence. In placing the colored children in schools nearest their residence the court order discriminates against white children who do not have such privilege. For instance, children living along the east side of Glebe Road at North 16th Street are only a block and a half from Woodlawn School but because they are in the Page School district they are required to go some thirteen or fourteen blocks to the Page School. Children living near the County line along North Montague Road are required to go some ten or twelve blocks to Stonewall Jackson School, when both Ashlawn and Glencarlyn Schools are much closer. Children living only a block and a half from Yorktown School are required to go three or four times that far and attend Jamestown School. Children facing on the south side of Lee Highway near Lexington Street have the Robert E. Lee School at their door, while those on the other side of the road are compelled to go seven or eight blocks to the Nottingham School.

The elements considered in laying out school districts were not fully developed in the evidence but certainly the boundaries are not to be broken down in order to place two or three children in their nearest schools.

The Motion and Complaint of the respondents did not allege that any of the seven children had been denied admission to the schools on account of race or color. And each of the witnesses admitted that race or color played no part

in the denial of admission—it was solely because the parents refused to make written application for admission as required by the Placement Board, except in one case where the assignment was made to a school other than one to which he presented himself, and the parent made no application to anyone for a transfer from the assigned school.

Further, it was not alleged to which schools the seven children applied, nor were any facts alleged which would entitle the particular children to be admitted to the particular schools applied to. At the trial it was brought out for the first time the various schools to which the seven children had applied; but the only reason given for applying to those schools was that was the nearest to their homes in each instance. It was never shown that a white child had ever had the right to be enrolled in the school nearest his home. Imagine the dislocation, the overcrowding of some schools and classes and the small attendance in others, if white children were granted the same privilege that has been granted these respondents—to attend the school nearest their home, with no other factors whatsoever being considered.

The placement of pupils is an administrative function, and should not be undertaken by a federal court unless and until it is clear that the proper school authorities either refuse to do so, or do so illegally. Being agents of the Commonwealth of Virginia, the petitioners are under a duty to comply with State laws until such laws are held invalid by a final judgment. When the judgment here appealed from was entered on September 14, 1957, there had been no such final judgment outlawing the Virginia Pupil Placement Act. Further than that, on July 27, 1957, the district court in this very case denied as premature a motion of the respondents which would have permitted them to by-pass the Placement Act (Brief and Appendix on Behalf of Appellants,

App. 3), by which action the Court impliedly, if not specifically, directed the petitioners to follow said Act until ordered otherwise. In obeying the Placement Act the petitioners kept hands off all matters relating to the assignment and enrollment of pupils for the September 1957 term. Any decision completely invalidating the Placement Act, should provide for an orderly transition in revesting the enrollment functions in the local authorities to permit the weighing of factors and problems not before the district court such as relative achievement levels, proper distribution of school population into school districts, transportation, efficient use of school buildings and personnel, and others. The interest of the public in having an orderly school system administered by school officials would seem to outweigh the interest of the seven respondents in getting in a desegregated school a few weeks sooner.

It is respectfully submitted that under the facts as outlined above the district court improperly exercised the functions of a local school board. Such action is not only of vast significance to the petitioners, but to all others who will feel the impact of this Court's decisions in the school segregation cases.

Point 4

The Decision of the Supreme Court of Appeals of Virginia in the DeFebio Case

It is contended that the prohibitions of an injunction cannot be avoided by the simple expedient of an undertaking to transfer the assignment power from the school board to the Pupil Placement Board. Petitioners do not disagree. It is also recognized that a successor in office may be bound by an injunction decree restraining a predecessor.

However, the district court is not correct in its conclu-

sion in this regard. Assuming, for sake of argument, that the Pupil Placement Board was a successor in office to the local school board and is bound by the restraining order previously entered by the district court, how can it also be said that the local school board, immediately or through their agents, denied admission to the respondents? If the petitioners have been succeeded in office as the district court states, they have no authority to admit, deny, enroll or not enroll pupils in the public schools of Arlington County.

Assuming that the Pupil Placement Board has knowledge of the injunction decree and it is otherwise binding on it, as stated by the district court, the local school authorities are no longer proper parties against which to proceed. If, in fact, the Pupil Placement Board has knowingly violated the order of the district court previously entered, appropriate remedies are available to the respondents.

In short, if the decision of the Supreme Court of Appeals of Virginia in the *DeFebio* case, *supra*, is to be recognized, the proceeding in the court below should be dismissed as to the petitioners.

Respectfully submitted,

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Dated April 2, 1958

CERTIFICATE OF SERVICE

I hereby certify that copies of the aforegoing petition have been served by mailing the same, with first class postage prepaid, to the following counsel of record:

Edwin C. Brown
1200 Cameron Street
Alexandria, Virginia

Spottswood W. Robinson, III
623 North Third Street
Richmond, Virginia

Oliver W. Hill
118 East Leigh Street
Richmond, Virginia

on this 2nd day of April, 1958.

.....

HENRY T. WICKHAM

APPENDIX I

Opinion of the United States Court of Appeals for the Fourth Circuit

Before PARKER, Chief Judge, SOBELOFF and HAYNSWORTH, Circuit Judges.

PER CURIAM:

This is another appeal in the school segregation case which was before us in *County School Board of Arlington County, Virginia, et al.* v. *Clarissa Thompson, et al.*, 4 Cir. 240 F. 2d 59, cert. den. 353 U. S. 910. After the affirmance of the decree on the former appeal, the District Judge found that seven Negro children had been denied admission to schools in violation of the terms of the decree and entered an order enjoining defendants from refusing to admit them to the schools to which they had applied for admission. We think that the order was clearly proper for reasons adequately stated in the opinion of the District Judge and nothing need be added to what was there said.

While ordinarily in cases of this sort an injunctive order should merely enjoin racial discrimination by school authorities without attempting to direct details of administration, there was a finding here that, in violation of the prior injunctive order of the court, discrimination had been practiced with respect to these Negro children. The judge found that the defendants in refusing them admission had acted in good faith in reliance upon a statute passed after the entry of the injunctive order and that they "did not intend any defiance of the injunction". Instead of adjudging them in contempt, therefore, and providing that the contempt might be purged by admitting the children to the schools to which they had made application, he took the milder

course of entering an order specifically defining what was required of defendants under the order which had been violated and giving them the opportunity of avoiding a contempt citation by complying with the order so entered. There is nothing in this of which they can justly complain.

Affirmed.

APPENDIX II

The Court's Findings of Fact and Conclusions of Law (Dated September 14, 1957)

Seven negro children of school age were refused admission as pupils in the public schools of Arlington County, Virginia on the opening day of the current session. The ground of the refusal was that the applicants had not complied with, or obeyed, the provisions of the Pupil Placement Act of Virginia, 1956 Acts, Extra Session, c.70. That statute requires every child before entering a public school for the first time, or on graduation from one school to another, to apply to the Pupil Placement Board for enrollment. In refusing the admission, the school principals were following the directions of the defendant County School Board and Superintendent who, in turn, were following the Act. These children, now called the plaintiffs, assert that the refusal violates the injunction previously entered by this court restraining the defendants from denying enrollment in any public school of the County, on account of race or color, to any otherwise qualified child. The plaintiffs move for a supplemental decree directing the admission of these children to the schools. The court will grant the motion.

I. In its injunctive decree the court took notice of existing and future State and local rules and administrative

remedies for the assignment of children to public schools. It directed conformance with them before the complainant should turn to the court. Of course, the decree only contemplated reasonable regulations and remedies. Defendants' position that the Pupil Placement Act is such a regulation or remedy is untenable. The procedure there prescribed is too sluggish and prolix to constitute a reasonable remedial process. On this point we also rely upon the reasoning of the Court of Appeals for this Circuit in School Board of the City of Newport News et al. v. Atkins et al., July 13, 1957.

It must be remembered that we are viewing the Act in a different frame from the setting in which it was tested by the Court of Appeals. The Act was then appraised as an administrative remedy which had to be observed before the persons aggrieved could seek a decree of judicial relief. Now the Act is measured against the enforcement of a decree already granted. It is, too, a decree which was passed before the adoption of the Placement Act and bears the approval of the final courts of appeal. For these reasons decision here need not await the outcome of the pending effort to obtain a review of the Court of Appeals' judgment.

This court had hoped that the initial step provided in the Placement Act might be isolated and utilized as a fair and practicable administrative remedy. It thought that a requirement that a pupil first entering a school, or transferring from one school to another, should seek placement from some official or board, would not only be a reasonable, but a necessary regulation as well, in the administration of the school. This agency, it seemed, might validly be a State agency exclusively—such as the Placement Board.

However, the court finds that it cannot fairly require the plaintiffs even to submit their applications to the Board for

school-assignment. The reason is that the form prescribed therefor commits the applicant to accept a school "which the Board deems most appropriate in accordance with the provisions" of the Pupil Placement Act. Submission to that Act amounts almost to assent to a racially segregated school. But even if the form be signed "under protest", the petitioner would not have an unfettered and free tribunal to act on his request. The Board still deliberates, on a racial question, under threat of loss of State money to the applicant's school if children of different races are taught there.

II. The court must overrule the claim of the County School Board and Superintendent that they should not be held to answer for the denial of admittance to the plaintiffs. In this they urge that the Placement Board had sole control of admissions—that the School Board and Superintendent had been divested by the Act of every power in this respect. As just explained, the Placement Act and the assignment powers of the Placement Board are not acceptable as regulations or remedies suspending direct obedience of the injunction. In law the defendants are charged with notice of these infirmities in the Board's authority. Actually the plaintiffs were denied admission by the defendants' agents—the school principals—while the defendants had the custody and administration of the schools in question.

Hence, the refusal by the defendants, immediately or through their agents, to admit the applicants cannot here be justified by reliance upon the Placement Board. The defendants were imputable, also, with knowledge that the injunction was binding on the Placement Board. The latter was the successor to a part of the School Board's prior duties; as a successor in office to the School Board, the Placement Board is one of those specifically restrained by the injunction.

III. We look, then, to see if race or color was the basis for the denial by the defendants and their agents of admission of the applicants to the named schools. It is immaterial that the defendants may not have intended to deny admission on account of race or color. The inquiry is purely objective. The result, not the intendment, of their acts is determinative.

In this inquiry we have no administrative decision with which to commence, save in one instance. Consequently, the court must examine the evidence in regard to each applicant and ascertain whether it indicates that the denial of admittance was there due solely to race or color. The court is not undertaking the task of assigning pupils to the schools. That is the function of the school authorities and the court has no inclination to assume that responsibility. Carson v. Warlick, 1956, 4 Cir., 238 F. 2d 724, 728. But it is the obligation of the court to determine whether the rejection of any of the plaintiffs was solely for his race or color. In this light only does the court now review the evidence.

IV. Arlington is a small county in size, but thickly populated and having the appearance of a city. It has 22,677 (about) pupils in its public schools. Of those 1432 are negroes—946 in the elementary schools, 311 in the junior high school (7th, 8th and 9th grades) and 175 in the senior high school (10th, 11th and 12th grades).

All together there are 40 school buildings in the County. These include 4 schools for negroes — one high school Hoffman-Boston (combining junior and senior) located in the extreme southern end of the County and embracing an elementary school with it; and 2 other elementary schools, Drew-Kemper near the Hoffman-Boston, and Langston in the district to be mentioned in a moment as the northern Hoffman-Boston.

There are 2 high schools for the white children, Wash-

ington and Lee in and to serve the northern half, and Wakefield in and for the south half, of Arlington; there are 6 junior high schools, Stratford and Swanson among them, scattered throughout the County for the white children; and there are 28 elementary "white" schools, including Fillmore and Patrick Henry.

Each school and its contiguous territory form a school district. The boundaries of a district are drawn to include the school population in the vicinity of the school as far as the facilities of the school will allow. Before the creation of the Placement Board the pupils assignable to each school were, if otherwise elegible, limited to those who resided in the school district. These lines have never been altered by the School Board, but the defendants point out that the Placement Board may or may not follow these bounds. Apparently it has done so.

Nothing in the evidence indicates that any of the plaintiffs is not qualified in his studies to enter the school which he sought to enter. Each applicant applied to a "white" school, but each lives in the district of that school or of another nearby "white" school. Nor did the evidence reveal a lack of space for him, or that the school did not afford the courses suited to the applicant. Counsel for the defendants explained that they did not adduce evidence as to the eligibility of the applicants for their respective schools because this was a matter within the purview of the Placement Board. Anyway, no intimation of disqualification appeared as to any applicant.

A review of the evidence is convincing that the only ground, aside from the provisions of the Placement Act, for the rejection of the plaintiffs was that they were of the negro race. The rejection was simply the adherence to the prior practice of segregation. No other hypothesis can be

sustained in any of the seven instances. The evidence as to the plaintiffs shows as follows:

(1) Rita and Harolyn Johnson, 15 and 16 years old, personally presented themselves for admission to the Washington and Lee High School on the opening day, September 5, 1957. They desired to enter the 10th and 12th grades, respectively, and carried with them documentary evidence of their academic proficiency, having attended schools in the District of Columbia during the last school session. Their residence is 2901 North Lexington Street, in the northern extremity of the County. It was within the Washington and Lee School District and a distance of approximately 2 miles (air line) from the school. The two other senior County high schools were twice that distance from the Johnson's.

They were refused admission because they had not executed the Board's placement forms. Their father declining to allow them to complete the forms, they are now attending school in the District of Columbia.

(2) Robert A. Eldridge, aged 9, wished to enter the 4th grade. As a new arrival in the County, his father had made application on August 15, 1957, for the enrollment of Robert in Fillmore, an elementary school. He procured a placement form but did not file it. On the opening of school Robert was refused admission into Fillmore for lack of the form.

This boy lives at First and Fillmore Streets, a distance of slightly more than one city block from the Fillmore School, but is within the School District of Patrick Henry, an elementary school six city blocks away. A white child living there would normally enter either Patrick Henry or Fillmore. The nearest school used by colored children was 1.25 miles away.

(3) Leslie Hamm had completed the elementary courses at the County's Langston School, and wanted to enter Stratford Junior High School. He was refused admission on the opening day of school at Stratford because he had not been assigned by the Placement Board, never having made application.

He resides at 1900 North Cameron Street. This address is within what we describe as the northern Hoffman-Boston District. This district, however, is 3.5 miles from the Hoffman-Boston School and from the area around that school also designated as a Hoffman-Boston District. The northern Hoffman-Boston District is set apart apparently because the area is occupied predominantly by negroes. However, a white child living in the northern District would be eligible to attend either the Swanson or Stratford Junior High School. Swanson is something more than a mile from the Hamm residence, Stratford slightly less than a mile.

(4) Louis George Turner and Melvin H. Turner, having respectively finished the 7th and 8th grades in one of the colored schools in the County, sought admission to the Swanson Junior High School on August 22, as well as on the opening day. Not having filled out the placement form, they were both refused admission. They live at the intersection of 22nd Street, North, and George Mason Drive. This is within the northern District of Hoffman-Boston. A white child in this section would ordinarily go either to Swanson or Williamsburg Junior High School. Swanson is less than a mile distant, while Williamsburg is about 1.25 miles away.

(5) George T. Nelson filled out a placement form and filed it on August 19 or 26 with the principal of Stratford Junior High School. On this application, the Pupil Placement Board assigned him to Hoffman-Boston School. On

the opening day of school he was refused admission at Stratford.

Nelson lives at 2005 North Cameron Street. This is within the northern Hoffman-Boston District. Hoffman-Boston School is 6 miles from his home, while Stratford is ½ mile away. Swanson Junior High School is a little further away. The basis for the Board's placement is not given; no reason is evident for ignoring Stratford or Swanson. It cannot be accepted, for it is utterly without evidence to support it.

V. The defendants and their agents, in barring the admission of the complainants, did not intend any defiance of the injunction. The bona fides of their assurance to the court—that they believed they should not admit the applicants without an assignment by the Placement Board—cannot be doubted. However, the defendants and their agents must now understand that the injunction is paramount in the present circumstances and that they can no longer refuse admittance to the plaintiffs.

The injunction will affect the school attendance very slightly. Into a white school-population of 21,245, only 7 negro children will enter; 1 negro will be with 11,421 white children in the elementary grades; and no more than 6 negroes among the 9,824 white high school students. Of 36 previously "all-white" schools in the County, 4 will be affected by the decree, and then not to a greater extent than 2 negroes in any one of the 4 schools.

The supplemental decree will be effective at the opening of the schools Monday morning, September 23, 1957.

(s) Albert V. Bryan
United States District Judge

September 14, 1957.

APPENDIX III

The Court's Supplemental Decree of Injunction
(Entered September 14, 1957)

Upon consideration of the motion by and on behalf of Harolyn Johnson, Rita Johnson, Robert A. Eldridge III, George Tyrone Nelson, E. Leslie Hamm, Jr., Louis George Turner and Melvin H. Turner that the court enter a further decree specifically directing the defendants to admit them to the schools to which they have applied for admission for the session of 1957-58, and upon consideration of the evidence and arguments of counsel for all the parties on said motion, the court is of the opinion, on the findings of fact and conclusions of law this day filed, that said motion should be granted, and, therefore, it is

ORDERED that the defendants, their successors in office, agents, representatives, servants, and employees be, and each of them is hereby, restrained and enjoined from refusing to admit the said movants to, or enroll and educate them in, the said schools to which they have made application for admission, that is:

1. Harolyn Johnson in the Washington and Lee High School;

2. Rita Johnson in the Washington and Lee High School;

3. Robert A. Eldridge III in the Fillmore School or the Patrick Henry School;

4. George Tyrone Nelson in the Stratford Junior High School or the Swanson Junior High School;

5. E. Leslie Hamm, Jr., in the Stratford Junior High School or the Swanson Junior High School;

6. Louis George Turner in the Swanson Junior High School; and

7. Melvin H. Turner in the Swanson Junior High School; upon the presentation by the said movants of themselves for admission, enrollment and education in the said schools commencing at the opening of said schools on the morning of September 23, 1957.

Let copies of this order be forthwith sent to counsel in this cause.

(s) Albert V. Bryan
United States District Judge

September 14, 1957.

APPENDIX IV

Chapter 70

Acts of the General Assembly of Virginia
Extra Session, 1956

Be it enacted by the General Assembly of Virginia:

1. § 1. All power of enrollment or placement of pupils in and determination of school attendance districts for the public schools in Virginia is hereby vested in a Pupil Placement Board as hereinafter provided for. The local school boards and division superintendents are hereby divested of all authority now or at any future time to determine the school to which any child shall be admitted. The Pupil Placement Board is hereby empowered to adopt rules and regulations for such enrollment of pupils as are not inconsistent with the provisions hereinafter set forth. Such rules and regulations shall not be subject to Chapter 1.1 of Title 9

of the Code of Virginia, the short title of which is "General Administrative Agencies Act". The Pupil Placement Board and any of its agents hereinafter provided for shall have authority to administer oaths to those who appear before said Board or any of its agents in connection with the administration of this act.

§ 1a. There is hereby created a board to be known as the Pupil Placement Board which shall consist of three residents of the State appointed by the Governor to serve for terms to expire at the expiration of the term of the Governor making the appointment. Members of the Board shall receive as compensation for their services a per diem of twenty dollars for each day actually spent in the performance of their duties and shall be entitled to reimbursement for their necessary expenses incurred in connection therewith.

§ 2. The Pupil Placement Board may designate, appoint and employ such agents as it may deem desirable and necessary in the administration of this act. It may authorize such agents to hold the hearings hereinafter provided for and take testimony and submit recommendations in any and all cases referred to them by said Board.

§ 2a. For the conduct of such hearings and to facilitate the performance of the duties imposed upon it and its agents under this act, the Pupil Placement Board is authorized to promulgate all such rules and regulations and procedures and prescribe such uniform forms as it deems appropriate and needful and to require strict compliance with the same by all persons concerned.

§ 3. The Pupil Placement Board in enrolling each pupil in a school in each school district shall take into consideration:

(1) The effect of the enrollment on the welfare and best interests of such child and all other children in said school as well as the effect on the efficiency of the operation of said school.

(2) The health of the child as compared to other children in the school.

(3) The effect of any disparity between the physical and mental ages of any child to be enrolled especially when contrasted with the average physical and mental ages of the group with which the child might be placed.

(4) Availability of facilities.

(5) The aptitude of the child.

(6) Availability of transportation.

(7) The sociological, psychological, and like intangible social scientific factors as will prevent, as nearly as possible, a condition of socioeconomic class consciousness among the pupils.

(8) Such other relevant matters as may be pertinent to the efficient operation of the schools or indicate a clear and present danger to the public peace and tranquility affecting the safety or welfare of the citizens of such school district.

§ 4. After the effective date of this act, each school child who has heretofore attended a public school and who has not moved from the county, city or town in which he resided while attending such school shall attend the same school which he last attended until graduation therefrom unless enrolled, for good cause shown, in a different school by the Pupil Placement Board.

§ 5. Any child who desires to enter a public school for the first time following the effective date of this act, and any

child who is graduated from one school to another within a school division or who transfers to a school division, or any child who desires to enter a public school after the opening of the session, shall apply to the Pupil Placement Board for enrollment in such form as it may prescribe, and shall be enrolled in such school as the Board deems proper under the provisions of this act. Such application shall be made on behalf of the child by his parent, guardian or other person having custody of the child.

§ 6. Both parents, if living, or the parent or guardian of a pupil in any school in which a child is enrolled by action of the Pupil Placement Board, if aggrieved by an action of the Board, may file with the Board a protest in writing within fifteen days after the placement of such pupil. Upon receipt of such protest the Board shall hold or cause to be held a hearing, within not more than thirty days, to consider the protest and at the hearing shall receive the testimony of witnesses and exhibits filed by such parents, guardians or other persons, and shall hear such other testimony and consider such other exhibits as the Board shall deem proper. The Board shall consider and decide each individual case separately on its merits. The Board shall publish a notice once a week for two successive weeks in a newspaper of general circulation in the city or county wherein the aggrieved party or parties reside. The notice shall contain the name of the applicant and the pertinent facts concerning his application including the school he seeks to enter and the time and place of the hearing. The Board shall, within not more than thirty days after the hearing, file in writing its decision, enrolling such pupil in the school originally designated or in such other school as it shall deem proper. The written decision of the Board shall set forth the findings upon which the decision is based. Any parent, guard-

ian or other person having custody of any child in the particular school in which a child is enrolled by action of the Board shall be deemed an interested party and shall have the right to intervene in such proceeding in furtherance of his interest.

§ 6a. Any party aggrieved by a decision of the Pupil Placement Board under this act, or any party defined as an interested party in §6 may obtain a review of such decision by filing an application in writing for a review thereof with the Governor within fifteen days after such decision. Such application shall be by a petition in writing, specifying the decision sought to be reviewed, and the actions taken by the Pupil Placement Board, together with a statement of the grounds on which the petitioner is aggrieved or by reason of which he is an interested party. The petitioner shall file with his petition a copy of the decision of the Pupil Placement Board and a transcript of the proceedings before the Pupil Placement Board, which shall be furnished to the petitioner by the Pupil Placement Board within ten days after request therefor upon payment of the costs of such transcript by the petitioner. Upon the filing of a petition for a review with the Governor, the Governor shall set the same for a hearing and within fifteen days after the petition has been filed with him, he shall file, in writing, his decision, enrolling such pupil in the school originally designated or in such other school as he shall deem proper. The written decision of the Governor shall set forth the findings upon which his decision is based.

§ 7. Any party aggrieved by a decision of the Governor under this act or any party defined as an interested party in §6 may obtain a review of such decision by filing in the clerk's office of the circuit court of the county or corporation court of the city in the jurisdiction of which such party

resides, within fifteen days after such decision, a petition in writing, specifying the decision sought to be reviewed, and the actions taken by the Governor, together with a statement of the grounds on which the petitioner is aggrieved or by reason of which he is an interested party. The petitioner shall file with his petition a copy of the decision of the Governor and a transcript of the proceedings before the Governor, which shall be furnished to the petitioner by the Governor within ten days after request therefor upon payment of the costs of such transcript by the petitioner.

§ 7a. Any interested party, as defined in §6 may, by petition, intervene for the purpose of making known and supporting his interest, in any proceeding for review of the Pupil Placement Board's decision instituted by an aggrieved party or by another interested party; and the court having jurisdiction of such review proceedings shall hear the evidence of as many interested parties, as defined in §6, in any such review proceeding, as in its discretion it may deem proper, whether or not such interested parties shall have petitioned for such review or petitioned to intervene.

§ 8. Upon the filing of the petition the clerk of the court shall forthwith notify the Pupil Placement Board, requiring it to answer the statements contained in the application within twenty-one days, but failure to do so shall not be taken as an admission of the truth of the facts and allegations set forth therein. The clerk of the court shall publish a notice of the filing of such application once a week for two successive weeks in a newspaper of general circulation in the county or city for which the court sits and shall, in addition, post the same at the door of the courthouse. The notice shall contain the name of the applicant and the pertinent facts concerning his application, including the school he seeks to enter, and shall set forth the time and place for

the hearing. The proceedings shall be matured for hearing upon expiration of twenty-one days from the issuance of the notice to the Pupil Placement Board by the clerk of the court and heard and determined by the judge of such court, either in term or vacation.

§ 9. The findings of fact of the Pupil Placement Board shall be considered final, if supported by substantial evidence on the record.

§ 10. From the final order of the court an appeal may be taken by the aggrieved party or any interested party, as defined in §6, to the Supreme Court of Appeals as an appeal of right, in the same manner as appeals of right are taken from the State Corporation Commission.

§ 10a. An injunction proceeding may be brought in any State court of competent jurisdiction by the Commonwealth, or by any interested party as defined in §6, for the purpose of restraining the performance of any act, or any intended or threatened act, which may be in evasion of, in disregard of, or at variance with, any of the foregoing provisions.

§ 11. Neither the Pupil Placement Board nor its agents shall be answerable to a charge of libel, slander or insulting words, whether criminal or civil, by reason of any finding or statement contained in the written findings of fact or decisions or by reason of any written or oral statement made during the proceedings or deliberations.

APPENDIX V

Opinion of the Supreme Court of Appeals of Virginia in the DeFebio Case

PETITION FOR WRIT OF MANDAMUS

On January 19, 1957, Theo T. DeFebio and her two children, Theodore Thomas DeFebio, 14 years of age, and

Dominick Nicholas DeFebio, 9 years of age, became residents of Fairfax county, Virginia. Subsequently, on the request of the mother, her two sons were permitted by local school authorities to attend, on a temporary basis subject to being officially assigned by the Pupil Placement Board, public schools in Fairfax county. The older son was admitted to the Mount Vernon High School and the other son to the Hollin Hall Elementary School. Despite repeated requests made by the school authorities, Mrs. DeFebio refused to execute and file for her sons "application for placement of pupil" forms as required by Chapter 70, Acts of Assembly, Extra Session (1956), Code, Secs. 22-232.1, *et seq.* Because of this refusal permission for the two children to attend the named schools was withdrawn.

Thereafter, Mrs. DeFebio and her two sons filed in this Court a petition for a writ of mandamus praying that the County School Board of Fairfax County, the Division Superintendent of Schools of Fairfax County, the Principals of Mount Vernon High School and Hollin Hall Elementary School of Fairfax County, the President and members of the State Board of Education and the Superintendent of Public Instruction be compelled to reinstate the two children in the schools, notwithstanding Mrs. DeFebio's refusal to execute the application for placement of pupil.

Petitioners contend that Sec. 133 of the Virginia Constitution vests the power of enrollment or placement of pupils in public schools exclusively in local school boards, and that the legislature is thereby prohibited from vesting such power in the Pupil Placement Board or any other body.

The legislature functions under no grant of power. It is the supreme law making body of the Commonwealth, and has the inherent power to enact any law not in conflict with, or prohibited by, the State or Federal Constitutions. Sec-

tion 133 of the Virginia Constitution, while vesting "supervision" of public schools in local school boards, does not define the powers and duties involved in that supervision. The general power to supervise does not necessarily include the right to designate the individuals over whom supervision is to be exercised. If the legislature deems it advisable to vest the power of enrollment or placement of pupils in an authority other than the local school boards, it may do so without depriving such local school boards of any express or implied constitutional power of supervision.

Petitioners' second contention is that their rights under the Fourteenth Amendment to the Constitution of the United States are infringed by the requirement that the parent execute and file the application for placement of pupil forms. In support of this contention, they cite numerous federal cases on integration of public schools, including *Brown v. Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. ed. 873, 38 A.L.R. 2d 1180, 349 U. S. 294, 75 S. Ct. 753, 99 L. ed. 1083; *Atkins v. School Board of Newport News*, 148 F. Supp. 430, *aff'd*, 4 Cir., ____ F. 2d ____, *cert. den.*, ____ U. S. ____, ____ S. Ct. ____, ____ L. ed. ____.

None of these authorities is relevant to, or determinative of, the issue presented by the facts in this case. Petitioners are members of the Caucasian race, and the mother desires her children to attend schools in which only the members of that race are enrolled. The issue here is quite narrow. It involves no broad constitutional question of racial discrimination. The only issue presented is whether, as a prerequisite to the admission of her children to the public schools, Mrs. DeFelice may be required to execute an application in which the only information sought is (1) Name, address, date of birth, sex, condition of health, physical or mental disabilities, and particular aptitudes of the child; (2) name

and address of school the child last attended, his grade and years in school, and (3) name and location of any school in Virginia in which any other child of applicant is enrolled.

There is nothing in such requirement that violates any of petitioners' constitutional or other legal rights. Indeed, the information sought could have been required by the school authorities without a specific act of the General Assembly. There is nothing in the record tending to show that the enforcement of the statute as to the petitioners will result in the children being denied admission to any school which they may be entitled to attend, or that they will thereby be required to attend any school to which they should not be admitted.

It is a fundamental principle of constitutional law, firmly supported by both Federal and State authorities, that a person who challenges the constitutionality of a state statute has the burden of proving that he himself has been injured or is threatened with injury by its enforcement. In other words, a person whose rights are not infringed by enforcement of a state statute can not successfully attack its constitutionality. It avails him nothing to point out that some other person might conceivably be discriminated against. "One who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him." *Premier-Pabst Sales Co.* v. *Grosscup*, 298 U. S. 226, 227, 56 S. Ct. 754, 755, 80 L. ed. 1153; *Barrows* v. *Jackson*, 346 U. S. 249, 73 S. Ct. 1031, 97 L. ed. 1586; *Morgan* v. *Commonwealth*, 168 Va. 731, 191 S. E. 791, 111 A.L.R. 62; *Grosso* v. *Commonwealth*, 177 Va. 830, 13 S. E. 2d 285; *Bailey* v. *Anderson*, 182 Va. 70, 27 S. E. 2d 914; *Avery* v. *Beale*, 195 Va. 690, 80 S. E. 2d 584; 11 Am. Jur., Constitutional Law, Sec. 111

et seq., p. 748 *et seq.*; 16 C.J.S., Constitutional Law, Sec. 76 *et seq.*, p. 226 *et seq.*

For the reasons stated the writ of mandamus must be denied.

Writ denied.